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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADIDAS AMERICA, INC., an
Oregon corporation;
and ADIDAS AG, a foreign entity,

Plaintiffs,

v.

21 Civ. 5615 (JSR)

THOM BROWNE, INC., a Delaware
corporation,

Defendant.

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New York, N.Y.
January 6, 2023
9:00 a.m.

Before:

HON. JED S. RAKOFF,

District Judge

-and a Jury-

APPEARANCES

KILPATRICK TOWNSEND & STOCKTON LLP
Attorneys for Plaintiffs
BY: R. CHARLES HENN, JR.
H. FORREST FLEMMING III

WOLF GREENFIELD & SACKS, PC
Attorneys for Defendant
BY: ROBERT MALDONADO
HARLEY LEWIN
BRYAN CONLEY
TONIA SAYOUR

ALSO PRESENT:

NITA GRAY, adidas paralegal
MICHAEL PUSTERLA, Thom Browne paralegal

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1 (Trial continued; jury not present)

2 THE COURT: Good morning. Before we talk about the
3 scope of the mark, I want to get a better idea of the schedule.

4 How much longer is defense counsel going to be on
5 cross?

6 MR. LEWIN: I think perhaps an hour or less but not
7 much more.

8 THE COURT: Who is the next witness?

9 MR. HENN: The next witness is Dr. Joachimsthaler.

10 THE COURT: Is that your last witness?

11 MR. HENN: I'm sorry?

12 THE COURT: How many witnesses do you have left?

13 MR. HENN: We have three. Dr. Joachimsthaler, Mr.
14 Bill D'Arienzo, and then our damages guy John Plumpe.

15 THE COURT: Do you expect to finish today?

16 MR. HENN: We are hoping to finish today.

17 THE COURT: All right. Let's turn to defense. What's
18 your current estimate of how long your case will take?

19 MR. MALDONADO: I think, your Honor, I would say three
20 to four days.

21 THE COURT: Yes. So what I'm concerned about is two
22 things: The first is the juror who wants to go attend her
23 mother-in-law's funeral. If worse comes to worse, we'll excuse
24 her and just proceed in her absence, and she won't be part of
25 it, but I'd like to avoid that if I can.

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1 Now, the case needs to go to the jury, worse case,
2 after summations and charge, by Friday. I'm hoping to do
3 better than that, but by Friday because next week I'll be
4 teaching a course at the University of Virginia. I can deal
5 with any notes telephonically or through video. Another judge
6 can take the verdict if I'm not back, but what I can't pawn off
7 on another judge is giving the charge and all like that. So we
8 need to be sure that the real final deadline is Friday.

9 Plus we told the jury two weeks, and I don't think
10 they'll be real happy if it goes into the following week. So
11 my hope is we could have the defense completed by Wednesday.

12 I guess it's Wednesday afternoon that she wants to
13 attend. We'll play it by ear, but you know now the parameters.

14 DEPUTY CLERK: Monday, the 16th, the courthouse is
15 closed for Martin Luther King day.

16 THE COURT: That's true too. Okay. Let's turn to
17 the -- I'm finding this an interesting issue. Nothing turns on
18 it but a few tens of millions of dollars, but anyway let me ask
19 plaintiff's counsel, how do you define your Three-Stripe Mark?

20 MR. HENN: We define it the same way every witness so
21 far has, which is three parallel stripes.

22 THE COURT: So, if, for example, someone made a jersey
23 that had three parallel red, white and blue stripes right
24 across the middle going across the entirety of the shirt,
25 you're saying that would be in violation of your mark?

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1 MR. HENN: So two things: First, if adidas made that,
2 it would comply with its guidelines and you saw the guidelines.

3 THE COURT: I'm talking about someone else.

4 MR. HENN: Okay. Well, if someone else did it, the
5 question will be confusing similarity. So is it done in a way
6 that is confusingly similar.

7 THE COURT: No, I think what that shows is how
8 excessively vague and overbroad your definition of the mark is.
9 Are you saying the example I put to one witness, supposing it
10 was instead of three marks across the chest, it was a spiral, a
11 red, white and blue spiral in the middle of the jersey, and
12 you're saying that's a violation of your mark?

13 MR. HENN: Your Honor, this gets back to what I said.
14 There are two buckets of things that you seem to be pushing
15 into one bucket, and I want to make sure because legally they
16 are different. One is what we claim to own, which is how we
17 use it and what is protectable and what is defined as our mark.

18 The second bucket, which is what you seem to be asking
19 about but in the context of this (indicating), the second
20 bucket by statute is everything --

21 THE COURT: No. No. I understand all of that. Thank
22 you very much. And you've told me that 14 times and eventually
23 it did penetrate through. But you have asked me to instruct
24 the jury that you have a mark called the Three-Stripe Mark,
25 and, therefore, I need to say to the jury what that means. And

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1 if what you claim it means is any combination of three parallel
2 stripes on a product that you compete for, then I think that
3 is, as a matter of law, too vague and overbroad to be a mark
4 that you can pursue.

5 MR. HENN: So, again, your Honor, what we own and what
6 we would have the jury instructed that we own as the
7 Three-Stripe Mark has nothing to do with what --

8 THE COURT: I don't think you own something that broad
9 and vague. That's my point. And I think contrary to your
10 cases, which I find overstated, I think you don't own anything
11 that cannot be defined with greater specificity than you're
12 giving me now.

13 The second point, of course, is also relevant. If
14 there were three stripes looking exactly like an adidas stripe
15 on the side of a motorcycle, you're not claiming that's
16 infringement, but you're not claiming it's an infringement
17 because you don't make motorcycles, right?

18 MR. HENN: Correct, it would not likely be confusingly
19 similar because consumers seeing it on a motorcycle probably
20 would not associate it with adidas.

21 THE COURT: What about if it's on a motorcycle jacket?

22 MR. HENN: If it's on a motorcycle jacket, I believe
23 consumers would be confused and think, okay, adidas is known
24 for jackets, they're known for motor sport jackets, and if I
25 see stripes on that, I'm confused.

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1 THE COURT: I understand that. That's the second
2 point you're calling the second bucket.

3 MR. HENN: Right.

4 THE COURT: But I do not -- and, indeed, I think,
5 frankly, although they haven't been raised, there are antitrust
6 implications to your claim that you own -- as a mark, you own
7 any time three parallel stripes appear on any product that you
8 are involved with. That cannot be right.

9 MR. HENN: Your Honor, it's no different than Apple.
10 It's no different than --

11 THE COURT: It is totally different than Apple. I was
12 thinking about this. I think a good analogy in some ways is
13 Chevron. Chevron has two stripes, but they are always the same
14 color. They are always the same angle. They are not the
15 vast -- no one at Chevron, so far as I know in any way -- just
16 assume this -- no one at Chevron claims that they own the mark
17 for all two stripes. They own a mark for two very specifically
18 placed stripes that are specific colors, specific angles,
19 everything.

20 So that's the problem I'm having with your definition.
21 I thought it was a point made in defense counsel's brief which
22 I thought was pertinent. Not all your witnesses defined it as
23 three parallel stripes. One witness said it's the Three-Stripe
24 Mark that, you know, the -- oh yes, a duck is a duck is a duck,
25 as Justice Scalia would say.

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1 MR. HENN: The first time she was asked, she said
2 Three-Stripe Mark is a Three-Stripe Mark. Counsel asked her
3 again for more specificity, and she specifically said three
4 parallel stripes.

5 THE COURT: I'm not making any rulings this morning.
6 I'm not yet convinced that this case can go to the jury saying
7 that adidas owns as its mark any three parallel stripes that
8 appears on any item of clothing of a competitor.

9 MR. HENN: The registrations themselves provide adidas
10 rights in the Three-Stripe Mark on a variety of products.

11 THE COURT: Your adversary is not contesting the
12 registration. If you want to say to the jury adidas has 17
13 registered and here they are, they're in evidence already, and
14 you can find that they infringe those particular marks, I'm
15 fine with that.

16 MR. HENN: Let me finish where I was going with my
17 point.

18 THE COURT: Yes, I'm sorry.

19 MR. HENN: Which is, we have registrations. The law
20 is clear that if you own or you are using marks if you want to
21 refer to them as plural, but if you are using the mark that is
22 registered in a different way, say, it's depicted in the
23 registration down the sleeves, and in this case we're saying
24 when people see horizontal marks, as we saw in the Poret
25 survey, when they see horizontal stripes, they think adidas.

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1 The standard is if there is a continuous or continuing
2 commercial impression, in other words, do consumers -- because
3 they've been exposed to the Three-Stripe Mark in many different
4 ways, do consumers perceive all of those Three-Stripe uses that
5 we are asserting as executions of the single mark. If they see
6 a common commercial impression between what's registered and
7 what has been used, it's legally the same mark. There's the
8 *Dial-A-Mattress* Federal Circuit case on that. So at a minimum,
9 if you were to go down the path that it sounds like you are -

10 THE COURT: I don't know of any case that governs me,
11 but maybe I'm wrong.

12 MR. HENN: Granted. I'm just telling you that's what
13 the Federal Circuit held in *Dial-A-Mattress*. The language is
14 very clear.

15 THE COURT: I have respect for the Federal Circuit
16 even though it is the single, most reversed circuit in the
17 Supreme Court in the United States, but go ahead.

18 MR. HENN: At a minimum, it seems to me the solution
19 to this is not to instruct the jury that there are 47 different
20 Three-Stripe marks. What the jury should be instructed about
21 is that question of law. You know, plaintiff asserts it has a
22 mark and it's called a Three-Stripe Mark, and it consists of
23 Three-Stripe. It's covered by its registration, but also used
24 in other ways.

25 Defendant claims there are a whole bunch of different

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1 marks, and you should assess whether the evidence presented
2 suggests it's one mark or multiple marks. You should assess
3 based on the evidence presented do they have a common
4 commercial --

5 THE COURT: That's a possibility, but then of course I
6 have to tell they have to find to determine whether it is one
7 mark or several marks. Part of the problem I have with
8 defendant's position which is -- I want to hear from them
9 now -- is I think it is not consistent with good jury practice
10 to say that they have to find and indicate in their verdict,
11 oh, it's this mark, registered mark or that registered mark.

12 My experience over the modest 27 years I've been on
13 the bench and the 400 trials I've had is that a special verdict
14 is simply an invitation to confusion. So I'm very disinclined
15 to go that route.

16 But let me hear from defense counsel.

17 MR. MALDONADO: Your Honor, good morning. So we do
18 believe that the trademark, as you said, should be defined and
19 there hasn't been consistency among the witness as to what the
20 Three-Stripe Mark is. And part of the problem is sending it to
21 the jury to deliberations without an instruction or definition
22 is we have had witness after witness after witness over the
23 last three days talk about the Three-Stripe Mark without
24 anybody --

25 THE COURT: Well, their definition is, as they just

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1 reaffirmed, three parallel stripes. What I'm suggesting
2 favorably to you --

3 MR. MALDONADO: Yes.

4 THE COURT: -- is that's immensely overbroad. I
5 haven't finished reading all the cases you both very kindly
6 provided to me, and I may change my mind, but I don't think
7 that is on its face a valid mark.

8 MR. MALDONADO: Right.

9 THE COURT: So then the question is how do you narrow
10 it. They're saying it doesn't need to be narrowed just to the
11 17 marks that everyone agrees they own. But also it includes,
12 to use a terrible word, a penumbra or the essence of what you
13 can gather from looking at all of those 17. That all sounds
14 very nice in the abstract, but it's very hard to put into the
15 concrete is the problem I'm having.

16 MR. MALDONADO: Right. And I think that that argument
17 gets into the second bucket that Mr. Henn talked about as to
18 whether there's confusing similarities between their mark and
19 whatever the accused marks are. In this case, your Honor, the
20 complaint lists more than the 17 registrations that they're
21 currently asserting in this case. So they've already gone
22 through the exercise or they've gone through registrations, and
23 they've selected the ones that they want to assert in this case
24 against my client's infringing or accused products. And so
25 they've already determined that not all of their registrations

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1 apply in this case, and they selected the ones that they want
2 to assert, which is kind of contrary to their notion that they
3 have one mark, that all registrations cover the same mark
4 because there's only a subset of registrations that are at
5 issue in this case. So if we tie the Three-Stripe Mark to
6 those registrations that they're asserting, that makes the most
7 sense in this case rather than having some undefined trademark.

8 THE COURT: So assuming I were persuaded to do that --
9 and, as I said, I'm making no rulings this morning, I'm still
10 thinking this issue through -- would you have any problem with
11 the jury, assuming they were instructed as you suggest, that
12 you have to find that a particular use by the defendant was a
13 violation of one of those 17 marks, that they have to -- that
14 they don't have to specify which one they found. That's the
15 practical problem that I think it raises, and I will take the
16 liberty of giving you an example from one of the many examples
17 I could give.

18 So I had a copyright case in which copyright liability
19 had already been determined so all the jury had to determine
20 was damages. There were 114 copyright violations. And I said
21 to the parties, let's just have the jury give a general
22 verdict. And both sides were quite adamant, "No, we need 114
23 separate verdicts because there is this nuance
24 as to number one on damages, and there's that nuance as to
25 number two on damages. So, of course, always being guided by

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1 the wisdom of counsel, I agreed to that.

2 So the jury comes back and they have different amounts
3 for each of the 114. When you added them up they came to -- by
4 the way, it took forever to take the reading of the verdict
5 because after each one, we had to ask all members of this civil
6 jury -- there were eight in that case -- is that your verdict
7 as to Count One, Count Two and so forth. It added up to though
8 exactly \$300,000. And everyone had expected a verdict that
9 would be in the low millions just from the nature of the case.

10 So then that was a Friday afternoon. About 6:00 I get
11 a call from one of the jurors who had just read about the
12 overall edition in the papers, in the media. And she said,
13 "No. No. No. We agreed to 3 million." And then I got a call
14 from the foreperson of the jury who said, "I'm getting calls
15 from all the other jurors, we really agreed to 3 million."

16 So I held a hearing on Monday morning with counsel,
17 and individually we voir dired the jurors, and they all said
18 the same thing.

19 When they got in the jury room, they all said, "We're
20 not going to go through 114 separate. We think overall it's
21 worth 3 million bucks." And then they turned foolishly to an
22 investment banker and said, "Okay, you whack it up for each of
23 the 114." And the investment banker used a calculator but put
24 in a wrong decimal place. And so we got this very strange
25 verdict. So, you know, not so easy to overturn a verdict, but

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1 nevertheless I declared a mistrial, and the parties settled a
2 week later for a million and a half bucks.

3 Now, I give you that long-winded story just to show
4 that you can't expect a jury to be a group of scientists or a
5 group of technologists or whatever. We have a terrific jury
6 here, but there is only so much we can ask them to do. So I
7 think I'd be more inclined in your direction if you were
8 agreeable to a general verdict, notwithstanding that they would
9 be in this hypothetical instructed that you have to find for
10 any violation that it was a violation of one or more of the 17
11 registered marks.

12 MR. MALDONADO: Your Honor, I think that if we're
13 limited to the registrations that are asserted in this case,
14 that we could consider them -- the jury could consider them as
15 a group. I think our concern is more on the accused products
16 that fall in certain buckets. There are different types of
17 products that are accused and different groupings of products
18 that are accused.

19 THE COURT: All right. Let me go back to plaintiff's
20 counsel. In terms of this case as opposed to the abstract,
21 does adidas really care whether the jury is told that they own
22 the Three-Stripe Mark in all its beauty and goodness, or that
23 they can collectively find infringement if it infringes any or
24 all of the -- or any one or more of the 17 marks adding, of
25 course, the colors, you know, the marks themselves saying color

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1 doesn't matter and stuff like that.

2 MR. HENN: As to the claim under Section 32 of the
3 Lanham Act, that would be appropriate -- that would be
4 inappropriate, frankly, reversible error under the Section 43
5 claims or the common law claims because those are not tied to
6 registrations.

7 THE COURT: Well, that's a good point.

8 MR. HENN: So we would need to address it. The
9 instruction I proposed earlier gets to that because the idea
10 would be the other marks -- the other iterations of the mark
11 we'd have shown the jury, they could conclude those have the
12 same commercial impression, and therefore even though it's not
13 in a registration certificate, they deem it part of the
14 Three-Stripe Mark and therefore afford it appropriate
15 protection and find that what they have done is confusingly
16 similar.

17 I think on this point, it's worth pointing out that
18 defendants are doing exactly the same thing with the Grosgrain.
19 They've registered it in this little square orientation,
20 DTX-131, which they use back here. And then when they want to
21 argue that we've delayed or that we were somehow doing
22 something crazy, they say, "Oh, but that's our Grosgrain all
23 the way down the arm, and that's the Grosgrain on the sleeve."
24 They're doing exactly the same thing. They're essentially
25 saying we have one mark, but we can use it all these different

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1 ways, and it's covered by the registration by this little
2 square.

3 THE COURT: It am shocked to hear that owners of marks
4 on either side of the case think that their mark should be
5 broadly interpreted. What a surprise.

6 MR. HENN: Exactly.

7 THE COURT: So, anyway, this has been very helpful.
8 I'm making no rulings today. I think the time when this will
9 come up will be at the charging conference. But this has been
10 very helpful. Let's see if the jury is here.

11 MR. MALDONADO: Your Honor, could I for the record --
12 we didn't make that argument that he just said. So just for
13 the record, that's not the argument we've made.

14 MR. HENN: I know you will control the schedule how
15 you see fit, your Honor, but I wonder if that Wednesday
16 afternoon slot might be an appropriate time for us to do the
17 charge conference.

18 THE COURT: You read my mind. That's exactly when I
19 would like to do it if we're at that stage. Okay. If not, we
20 can always do it -- and this is not a joke -- I have done it in
21 the evening, and because we have such fantastic court
22 reporters, I've not hesitated to go to midnight where
23 necessary. So just a threat.

24 Let's get the witness back on the stand.
25

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Vanderhoff - Cross

1 (Jury present)

2 THE COURT: Good morning, ladies and gentlemen. Thank
3 you as always for your promptness. I'm glad we're able to get
4 going right away this morning. This stands in direct contrast
5 to the House of Representatives of the United States, but, in
6 any event, we're ready to proceed.

7 Go ahead, counsel.

8 MR. LEWIN: Thank you.

9 SARAH VANDERHOFF, resumed.

10 CROSS-EXAMINATION CONTINUED:

11 BY MR. LEWIN:

12 Q. Ms. Vanderhoff, good morning to you. I hope you made it in
13 without getting too wet.

14 A. Good morning.

15 Q. You testified yesterday that you learned of what the judges
16 call the four-stripe problem in May of 2018, correct?

17 A. No, I believe I testified that we reached out to Thom
18 Browne's counsel in the U.S. in May of 2018.

19 Q. All right. And you learned of the problem earlier than
20 that, correct?

21 A. Earlier that year, yes.

22 Q. And under what circumstances did you learn of the
23 four-stripe problem?

24 A. I learned about it from my colleague in Europe Dana Kabelá.

25 Q. What did she do, send you a note or something?

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Vanderhoff - Cross

1 A. She or someone on her team sent me a note.

2 Q. And Thom Browne, according to her testimony yesterday and
3 in deposition, didn't come up on your radar screen at all
4 before 2018, correct?

5 A. That's correct.

6 Q. And do you remember testifying that you were surprised --
7 yesterday that you were surprised to find that he was doing
8 some athletic gear because you knew he was in or you had known
9 him to be a luxury men's fashion designer who made formalwear.
10 Do you remember that?

11 A. Yes.

12 Q. And that implies at least, pardon me -- how did you come to
13 know that Thom Browne was in formalwear as a luxury designer
14 prior to the information that you obtained in 2018 that you
15 were referring to that surprised you?

16 A. It's hard to say with brands when I personally knew of him
17 in that way.

18 Q. Do you have some sense of how far in advance you knew Thom
19 Browne was a luxury designer of men's fashions?

20 A. No. I think adidas knew them to be that from the earlier
21 2007 dispute.

22 Q. You said -- you used the plural "we" in answering the
23 question. "We knew him to be." Who are you referring to?

24 A. Adidas.

25 Q. Adidas. Do you have anybody in mind at adidas that knew

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Vanderhoff - Cross

1 earlier than you're claiming?

2 A. I'm sorry, I don't understand the question.

3 Q. Let me rephrase it for you. Who is it that you had in mind
4 when you said "we"?

5 A. I guess adidas. Ms. Backman handled the matter back in
6 2007 with Thom Browne.

7 Q. And did she ever indicate to you in 2007 that she had an
8 awareness of Thom Browne as a men's fashion designer?

9 A. I don't -- I don't think so. I don't recall talking to her
10 about it.

11 Q. So it wouldn't have been her that you're referring to
12 earlier, could you?

13 A. Well, when I say "we," I'm referring to adidas, the
14 company. And so as part of my job, I know the history of this
15 dispute because of this.

16 Q. Why did you use -- what did you have in mind other than the
17 broad 90,000 employees or something that comprises adidas
18 globally that gave rise to the impression that you had
19 earlier -- that adidas had earlier knowledge?

20 MR. FLEMMING: Objection, your Honor. Legal
21 conclusion.

22 THE COURT: Well, it's not ideally phrased, but I
23 think what he is inquiring about is you had the impression that
24 Thom Browne was limited to men's fashion designs of a certain
25 market, and he wants to know how you got that impression. And

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Vanderhoff - Cross

1 I take it, it's not something you got from Ms. Backman because
2 you didn't discuss this matter with her, right?

3 THE WITNESS: Correct.

4 THE COURT: So did you get it just from your general
5 knowledge of the fashion industry or do you have any specific
6 recollection of ever discussing it with anyone at adidas prior
7 to the events of 2018?

8 THE WITNESS: I didn't discuss it with anyone at
9 adidas prior to 2018, but in the course of this dispute,
10 knowing what happened back in 2007, the product at issue was
11 formalwear.

12 THE COURT: What you're saying is after the matter
13 arose in 2018, you went back and looked at the internal
14 documents or discussed with people what had happened in 2007.
15 Is that right?

16 THE WITNESS: That's right.

17 THE COURT: And that's the source of your belief that
18 adidas knew earlier that Thom Browne was involved in high-level
19 men's fashion.

20 THE WITNESS: Thank you. Thank you for helping me get
21 there.

22 THE COURT: Go ahead, counsel.

23 MR. LEWIN: Thank you, your Honor.

24 BY MR. LEWIN:

25 Q. Now, you arrived at adidas in 2018, as I understand your

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Vanderhoff - Cross

1 testimony. Is that correct?

2 A. That's right.

3 Q. And your testimony was that you had no discussions with
4 Ms. Backman, your predecessor?

5 A. That's right. When I joined the company, I did not speak
6 to Ms. Backman.

7 Q. Right. And that there was no transition memo left for you,
8 correct?

9 A. That's right, there was not.

10 Q. And that in that same time period, you were not aware of
11 Thom Browne, correct?

12 A. Correct.

13 Q. Now, before you moved over to adidas, I think your
14 testimony was that you were an associate; you used the term
15 lowly associate in Kilpatrick Stockton, correct?

16 A. Correct.

17 Q. And that you worked at least some of the time with
18 Mr. Henn, correct?

19 A. Correct.

20 Q. And that you worked on most of the adidas cases while you
21 were at Kilpatrick Stockton?

22 A. I worked on many of them.

23 Q. I think your terminology when you testified earlier was
24 "most." Is that correct?

25 A. If I said that, yes.

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Vanderhoff - Cross

1 Q. And you don't recall whether any of those were Thom Browne
2 matters, are correct?

3 A. No. I have no recollection of working on a Thom Browne
4 matter.

5 THE COURT: To put it slightly differently, is it your
6 best recollection that you did not work on a Thom Browne matter
7 during your period as an associate, a well-respected associate,
8 I'm sure, at the firm?

9 THE WITNESS: That's right.

10 THE COURT: Okay.

11 Q. Can I show you PX-0174, please.

12 Do you recognize this document?

13 A. Yes.

14 Q. It's a privilege log, right?

15 A. Right.

16 Q. And a privilege log is a summary form of recording events
17 that take place that otherwise would be privileged between
18 counsel and client or counsel to counsel pertaining to a
19 matter, correct?

20 A. Correct.

21 Q. Now, you weren't always known as -- by your current last
22 name, correct?

23 A. Correct.

24 Q. And I think that you had a -- as most of us do, on the
25 women's side, at least -- another name before getting married,

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Vanderhoff - Cross

1 correct?

2 A. Correct.

3 Q. And what name was that?

4 A. Maurer.

5 Q. Now, I'd like to call your attention to line 5 on the
6 privilege log, if I may. Can you read this and then give me a
7 general description, give the jury a general description?

8 THE COURT: Is this in evidence?

9 MR. LEWIN: Yes, sir.

10 THE COURT: Okay. Go ahead.

11 Q. If you might, this is divided only because of the -- if I
12 may, it's one line. The length of the document requires
13 splitting it up. If you could, tell us the date first on the
14 left.

15 A. November 21, 2006.

16 Q. And the privilege is asserted that's clear, I think. And
17 can you say who sent it?

18 A. I did.

19 Q. And who did it go to?

20 A. It went to Charlie Henn.

21 Q. He's the attorney sitting here, right?

22 A. Right.

23 Q. And can you say what the subject matter of it was?

24 A. Potential claims, litigation research, strategy, or
25 analysis in adidas v. Thom Browne.

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Vanderhoff - Cross

1 Q. Correct. Now, that would indicate that you had at least
2 some conversation with Charlie Henn in 2006, correct?

3 A. It would.

4 Q. All right. Does that refresh your recollection that
5 perhaps you learned about Thom Browne earlier than 2018?

6 A. It doesn't. I have no recollection of this email.

7 Q. And you know it's an email because it says message,
8 correct?

9 A. Correct.

10 Q. So you have no recollection on November 21 -- on the events
11 of November 21, 2006?

12 A. That's right, I don't.

13 Q. Would you agree with me that the --

14 THE COURT: I'm sorry. I apologize profusely.

15 Counsel, come to the sidebar.

16 (Continued on next page)

N16Qadil

Vanderhoff - Cross

1 (At the sidebar)

2 THE COURT: Does someone have a copy here in court of
3 the underlying email?

4 MR. HENN: Not in court. I'm sure we can track it
5 down. It's on the log.

6 MR. LEWIN: It's privileged.

7 THE COURT: Of course it's privileged. The reason I'm
8 raising this, there's a possibility that privilege may be
9 waivable in this situation. I'm not sure. But I wanted to see
10 the email before I raised this with counsel so if someone will
11 get me the email since the witness is going to be here all the
12 time, we can always recall her if necessary.

13 (Continued on next page)

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N16Qadi1

Vanderhoff - Cross

1 (In open court)

2 BY MR. LEWIN:

3 Q. I'd like to show you PX-175, if I may. Do you recognize
4 this?

5 A. I do.

6 Q. Again, it appears to be an email, correct?

7 A. Correct.

8 Q. And it appears to be sent from you -- from Vanessa Backman,
9 pardon me, to Mr. Henn on November 15, 2006, correct?

10 A. Correct.

11 Q. It says the subject is Thom Browne, correct?

12 A. Yes.

13 Q. Have you seen this before today?

14 A. I believe so.

15 Q. Have you seen this before today?

16 A. I believe I have.

17 Q. When did you first become aware of this?

18 A. In the course of this litigation.

19 Q. Would it be fair to say that you became aware of it when
20 you reviewed the privilege log that you indicated you had
21 reviewed this comes to your attention?

22 A. I can't say exactly when I saw this document, but it was
23 sometime in the course of this current dispute.

24 Q. Can we have page 2 of the document up, please.

25 Have you seen this page before today?

N16Qadil

Vanderhoff - Cross

1 A. Yes.

2 Q. When did you first see this page?

3 A. Again, it would have been in the course of this litigation.

4 Q. So you didn't see this page prior to the litigation,
5 correct?

6 A. I don't have a recollection of seeing this page prior to
7 this dispute, no.

8 Q. And would you agree with me that this is the article that
9 Vanessa Backman testified started her inquiry into Thom Browne?

10 A. Yes.

11 Q. And that was in 2006, right?

12 A. That's right.

13 Q. While you were still an associate at Kilpatrick Stockton?

14 A. That's right, brand new.

15 Q. Can we go back to 174 please, plaintiff's 174. Could we
16 look at line 6.

17 Would you agree with me that this line asserts
18 privilege over a communication from Vanessa Backman to Charlie
19 Henn?

20 A. Yes.

21 Q. And this was sent 11/21/2006?

22 A. November 22, 2006.

23 Q. 22, pardon me. Yes. And this would appear to be an email,
24 correct?

25 A. Yes.

N16Qadil

Vanderhoff - Cross

1 Q. And it, again, apparently was involved with potential
2 claims, litigation, research, strategy or analysis in adidas v.
3 Thom Browne. Do you see that?

4 A. I do.

5 Q. And this would represent a second contact from Vanessa
6 Backman to Charlie Henn regarding Thom Browne strategy,
7 correct?

8 A. I don't know how many times Vanessa contacted Charlie.

9 Q. I'm not asking that. If I may be clearer for you. You
10 just read an email on a privilege log that was dated
11 differently than the one you're looking at. So I'm asking you
12 that at least there are two times that Vanessa Backman, right,
13 contacted Mr. Henn while you were the associate at Mr. Henn's
14 office engaged in most of the adidas cases, correct?

15 A. This is a second communication, yes.

16 Q. All right. I show you now, please, what's been marked as
17 Plaintiff's 176. Do you recognize this redacted document?

18 A. Is this the same one we just looked at?

19 Q. Frankly, no.

20 A. So this is -- yes, okay.

21 Q. If we can flip back for a second to 174 just for a second,
22 line 4. That's on the 21st of November 2006, right?

23 A. That's right.

24 Q. And that had with it a second page document, correct?

25 A. I'm not sure. I'd have to look at it again, sorry. It's

N16Qadil

Vanderhoff - Cross

1 hard to remember the redacted.

2 Q. Let's look at it again then. Let's look at the email, the
3 redacted email. Let's look at the second page. Now, this one
4 will has an ink circle around it, a pen circle, correct?

5 A. Yes.

6 Q. And is this something that you've ever seen before this
7 litigation?

8 A. No, not before this litigation.

9 Q. You would agree with me, would you not, though that this
10 would appear to be different from the attachment on the earlier
11 email, correct?

12 A. Correct, it's written on. It's the same document, but it's
13 written on.

14 Q. Can we go to PX-176, please. I'm sorry. Yes. Let's go to
15 that second page.

16 Would you agree with me that adidas must have been at
17 least concerned about Thom Browne's three stripes on a sports
18 jacket in 2006, concerned enough to send an email twice to
19 Mr. Henn?

20 A. Yes, they were concerned.

21 Q. Can we look at line 5 of 174, please. We saw this a moment
22 ago. This is a communication, slightly different, this is
23 going from you, correct?

24 A. This is the same one we looked at earlier, yes, from me.

25 Q. Yes, it's going from you to Charlie Henn, right?

N16Qadil

Vanderhoff - Cross

1 A. Right.

2 Q. Would you agree with me it's on the same date, at least
3 that the email from Vanessa Backman went to Charlie Henn with
4 the second page?

5 A. Yes.

6 Q. You would agree with me.

7 And you would also agree with me that the subject
8 matter of your privileged email is litigation, research and
9 some other things against Thom Browne?

10 A. Yes.

11 Q. Did you do that research?

12 A. I'm sure I did. I don't remember the substance of this
13 message.

14 Q. Well, during the course of that research, did you discover
15 who Thom Browne was?

16 A. I am sure I did.

17 Q. Thank you.

18 Would it be fair to say that it was common practice
19 for Mr. Henn to have you do research to determine the validity
20 of a trademark claim that they might be forwarding?

21 THE COURT: Sustained.

22 Q. If we could go back to PX-175, second page, please. Can we
23 blow up the second column?

24 Would you agree with me that the press article
25 indicated that not only were the goods of Thom Browne being

N16Qadil

Vanderhoff - Cross

1 sold at Thom Browne shop but also Bergdorf Goodman, Barneys,
2 Jeffrey, Colette and other upscale retailers?

3 A. Yes, that's what it says.

4 Q. Do you recall taking any steps in 2006 or, for that matter,
5 between 2006 and 2018 to visit any of the stores listed, all of
6 whom -- most of whom would appear to have branches in the New
7 York metropolitan area?

8 MR. FLEMMING: Objection. Hearsay.

9 THE COURT: Well, also let me ask the witness because
10 I'm a little unclear. The sentence that's being highlighted
11 says, "Browne stressed that the menswear for sale in the
12 store" -- meaning his store -- "is not from his runaway
13 collection. Those looks are sold in Bergdorf Goodman, Barneys,
14 New York, Jeffrey, Colette and other upscale retailers."

15 Do you see that?

16 THE WITNESS: I do.

17 THE COURT: So is it your understanding that what
18 Mr. Browne was saying was that his stuff was not being sold in
19 his store?

20 THE WITNESS: I'm sorry.

21 THE COURT: At least not the stuff from his runway
22 collection -- excuse me -- not runaway, but runway.

23 THE WITNESS: Correct.

24 MR. LEWIN: Your Honor, if I may before she answers, I
25 think she's testified she hasn't seen this before.

N16Qadil

Vanderhoff - Cross

1 THE COURT: I know, but you're questioning her about
2 it and therefore we need to understand, and the jury needs to
3 understand, what's actually being stated in these two
4 sentences.

5 MR. LEWIN: Fair enough.

6 Q. Now, you indicated that you've been deposed as a witness
7 for adidas many times, I think was the expression?

8 A. I have.

9 Q. And at least twice in this current matter, correct?

10 A. That's right.

11 Q. When you were deposed on July 19, you were under oath,
12 correct?

13 A. That's right.

14 Q. And you were informed that if you didn't understand a
15 question, you could tell the examining attorney?

16 MR. FLEMMING: Objection. Is this impeachment?

17 THE COURT: Counsel, I don't think we need to go
18 through all of that. If you want to impeach her, give the page
19 number and lines.

20 MR. LEWIN: I'll withdraw it, your Honor.

21 THE COURT: Okay.

22 Q. Now, I think you indicated that your group at adidas during
23 the time you have been there sent 200 formal demand letters to
24 infringers since 2008. Is that correct?

25 MR. FLEMMING: Objection. Privileged.

N16Qadi1

Vanderhoff - Cross

1 THE COURT: How many formal demand letters, if you
2 know, has your group at adidas sent since 2008?

3 MR. FLEMMING: Objection. May we have a sidebar your
4 Honor very briefly?

5 THE COURT: Sure.

6 (Continued on next page)

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N16Qadil

Vanderhoff - Cross

1 (At the sidebar)

2 THE COURT: That could not possibly be privileged.

3 MR. FLEMMING: I apologize.

4 We weren't allowed to present testimony on adidas
5 specific enforcement efforts.

6 THE COURT: That's not true. You were allowed to do
7 that. What I cut you off on was the specific reference to how
8 many cases resulted in verdicts in your favor and things like
9 that. We got into a discussion about Mr. Henn's great success,
10 but of course he is still aiming for a bar, but the -- there
11 was general discussion about this that was allowed. Overruled.

12 (Continued on next page)

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N16Qadi1

Vanderhoff - Cross

1 (In open court)

2 THE COURT: I think the pending question is: Do you
3 have a knowledge of approximately how many formal letters were
4 sent -- I don't have the exact words in front of me -- but
5 maybe counsel wants to put the question.

6 MR. LEWIN: I do.

7 Q. You recall stating in your declaration that your group had
8 sent over more than 200 settlement agreements involving the
9 Three-Stripe Mark since 2008?

10 A. I'm not sure what declaration you're referring to.

11 THE COURT: You can show it to her to refresh her
12 recollection if you have it.

13 MR. LEWIN: Unfortunately, it's loose.

14 THE COURT: Don't identify what it is. Just show it
15 to her.

16 MR. LEWIN: It's a declaration --

17 THE COURT: No, I said don't identify it.

18 MR. LEWIN: I'm sorry, I thought you said please
19 identify it.

20 THE COURT: No.

21 MR. LEWIN: It's two-sided printing.

22 THE WITNESS: Oh, double-sided. Okay.

23 THE COURT: Let me see.

24 MR. LEWIN: Thank you, your Honor.

25 (Continued on next page)

N16sADI2

Vanderhoff - Cross

1 BY MR. LIMAN:

2 Q. Having seen the document that I just showed you, does it
3 refresh your recollection as to whether or not you've asserted
4 that 20 or more formal demand letters were sent since 2008
5 regarding the Three-Stripe Mark?

6 A. Yes, that's right.

7 Q. All right. Having reviewed the document I just showed you,
8 would it be fair to say that adidas has entered more than 200
9 settlement agreements in the Three-Stripe Mark since 2008, is
10 that correct?

11 A. Yes.

12 Q. You've negotiated, in the past decade or so, at least 50
13 business-to-business resolutions with potential infringers of
14 Three-Stripe Marks, is that correct?

15 A. Yes.

16 Q. Now you also sent take-down notices to large e-commerce
17 websites, correct?

18 A. Yes, we do that.

19 Q. All right. And that you filed more than 90 lawsuits in the
20 United States since 2008, correct?

21 A. Yes, we do.

22 Q. And you have also filed, I think alleged since 2017 at
23 least, that you filed over 100 proceedings with the U.S. Patent
24 and Trademark office?

25 A. That sounds right.

N16sADI2

Vanderhoff - Cross

1 Q. OK. Which adidas registrations have you filed proceedings
2 on at the Patent and Trademark office, do you recall?

3 A. I don't recall off the top of my head.

4 Q. Would you agree with me that this panoply of effort
5 indicates that adidas considers its IP rights tremendously
6 important?

7 A. Yes, we do.

8 Q. Would you agree with me if I said that intellectual
9 property is probably the most important asset to a fashion
10 company?

11 MR. FLEMMING: Objection, foundation.

12 THE COURT: Sustained.

13 Q. Now, I think you said as well that your team at least
14 monitors the marketplace to protect your client's IP rights, is
15 that correct?

16 A. Yes.

17 Q. In particular regarding trademark, is that correct?

18 A. That's right.

19 Q. All right. And how many members of your team participate
20 in this monitoring effort?

21 A. Everyone.

22 Q. And I think, if you can remind me, we're talking about
23 North America United States right now, what do you have on your
24 team, four or five?

25 A. Currently three and a half.

N16sADI2

Vanderhoff - Cross

1 Q. Three and a half. I'm not going to ask -- I'm not asking
2 about a half.

3 A. I'm just sharing literally.

4 Q. I'm not going near that one.

5 And You've used outside investigators from time to
6 time to do this monitoring, correct?

7 A. From time to time, correct.

8 Q. And your employees are considered to stay alert and let you
9 know if they see things on the street that raise an issue for
10 them, is that correct?

11 A. Yes.

12 Q. Do you happen to know how many employees you have globally?

13 A. I don't know that. Tens of thousands, but I don't know
14 exactly how many.

15 Q. Do you know happen to know how many employees you have in
16 the United States?

17 A. I don't know that.

18 Q. Do you think it's more than 5,000?

19 A. I think it's -- I mean, I'm totally speculating -- more
20 than five, but probably less than 10,000 is my guess.

21 Q. Fair enough.

22 And you have fans of the adidas brand, correct?

23 A. We do.

24 Q. All right. Now, when you have -- withdrawn.

25 Your salespeople in the United States, do they sell

N16sADI2

Vanderhoff - Cross

1 their accounts by region?

2 A. Um, I -- I'm not exactly sure how they organize their
3 setup.

4 Q. Did you ever hear the expression national accounts?

5 A. Well, there are definitely customers who sell nationally,
6 yes.

7 Q. OK. Nordstrom's, Neiman's, those would be national
8 accounts, would you agree?

9 A. I'm not sure if Neiman's would be. I know Nordstrom is.

10 THE COURT: This is not your department, correct?

11 THE WITNESS: No.

12 Q. Do you ever receive information from your sales team about
13 possible infringements?

14 A. Yes, I do.

15 Q. And aren't those salespeople pretty much knowledgeable
16 about their area that they sell into, correct?

17 THE COURT: Sustained.

18 MR. LEWIN: Thank you, your Honor.

19 Q. Now, adidas also encourages its licensees to report
20 instances of possible infringement, correct?

21 A. Um, I'm not sure if we encourage them to do that. Maybe we
22 do.

23 THE COURT: Do you receive reports from time to time
24 from licensees as to possible infringement?

25 THE WITNESS: Yes.

1 THE COURT: All right.

2 Q. So when you go -- you have testified at one time that,
3 amongst other efforts, adidas monitors the marketplaces doing
4 sweeps, correct?

5 A. That's right.

6 Q. What is a sweep?

7 A. Well, the term sweep has evolved. A sweep is basically
8 looking at the marketplace, so sending people into certain
9 markets and to go to physical stores to go shopping, and mainly
10 shopping malls or other kind of high-traffic shopping areas.

11 Q. For example, the infamous Canal Street, right?

12 A. That would be one, yes.

13 Q. That would be one for counterfeit goods?

14 A. For counterfeit goods.

15 Q. And when you're going into the higher-end department stores
16 doing sweeps or malls doing sweeps, you're looking for
17 everything?

18 A. We're looking for everything in both kinds of locations.

19 Q. All right. You mentioned that a technique of doing market
20 sweeps has increased somewhat.

21 How often do you conduct these?

22 A. Um, twice a year we physically visit stores.

23 Q. Do you perform what you call a sweep at the stores if they
24 are larger than just straight in, walk in and see whatever they
25 are selling?

N16sADI2

Vanderhoff - Cross

1 A. Um, what do you mean?

2 Q. I'll clarify it.

3 If you're going to do a sweep at Nordstrom's, do you
4 do all the floors at Nordstrom's?

5 A. Yes.

6 Q. OK.

7 A. Yes.

8 Q. Your sweeps aren't random, though, are they?

9 A. Um, what do you mean by random?

10 Q. Well, you indicated that you conduct regular sweeps in
11 major cities and you base that on reports received from people
12 in the street. So I'm just suggesting that you have a goal in
13 mind?

14 A. Do you want me to tell you, so when we're looking at where
15 to go do market sweeps, I might say, can you go to a shopping
16 mall in Chicago?

17 Q. Fair enough.

18 A. Something like that.

19 Q. All right. Have you ever received a tip about Thom
20 Browne's product at Nordstrom?

21 A. Um, no, I have not.

22 Q. How about Barney's?

23 A. No.

24 Q. And in your enforcement efforts, do you search online for
25 potential infringing products?

N16sADI2

Vanderhoff - Cross

1 A. We do search online.

2 Q. Do you have a dedicated person at adidas that does this
3 work?

4 A. Again, we kind of all do it.

5 Q. Do you base it on any underlying information when you
6 conduct a search?

7 A. Um, no, we're not. We're just searching, again, kind of
8 places where lots of people shop.

9 Q. Now, I think you indicated in your testimony that one of
10 the tools that you use is a trademark watch service, is that
11 correct?

12 A. Yes.

13 Q. And have you used that since you joined adidas?

14 A. Yes.

15 Q. OK. And I think you also indicated that you instruct the
16 trademark watch service to alert you of trademark filings
17 involving stripes, is that correct?

18 A. That's right.

19 Q. And specifically when you say you alert them to filing
20 stripes, what are the parameters that they are instructed by to
21 alert you to?

22 MR. FLEMMING: Objection, product privilege.

23 THE COURT: Overruled.

24 A. I don't know the exact parameters that we ask the trademark
25 service to provide, but it would be -- we would not be looking

N16sADI2

Vanderhoff - Cross

1 for stripes applications in, like, the car class of goods, for
2 example.

3 Q. When you define stripes for your watch service, how do you
4 define them?

5 A. I don't know exactly how we define that, and it just -- it
6 pulls all of the applications. We then review them and
7 investigate them. It's not that we -- you know, it's just a
8 monitoring device.

9 Q. I understand. Do you have dedicated person in your team
10 that reviews the watch services?

11 A. Um, not in my team, but on a comparable team in Amsterdam.

12 Q. So the watch information doesn't go to you directly, it
13 goes to your team in Amsterdam?

14 A. Right.

15 Q. And would that be Dana Kabelas?

16 A. No.

17 Q. Who would that be?

18 A. Her name is Maya Rodale.

19 Q. OK. And which watch service reports to adidas?

20 A. It's called Thomson, or Clarivate now, I think.

21 Q. And they are obligated -- just so the jury is clear, their
22 obligation is to watch trademark applications wherever they are
23 watching then, and if something comes up with stripes, they
24 bring it to your attention, correct?

25 MR. FLEMMING: Objection, vague.

N16sADI2

Vanderhoff - Cross

1 THE COURT: It's a little vague, but what's your
2 understanding of what they are asked to do?

3 THE WITNESS: That's what they are asking to do.

4 THE COURT: OK.

5 MR. LEWIN: Thank you, your Honor.

6 THE COURT: Counsel, I'll give you whatever time you
7 need. It has been 45 minutes. You estimated a half hour,
8 so...

9 MR. LEWIN: I thought I had said an hour or less, your
10 Honor, but I may be wrong.

11 THE COURT: I'm sorry. You're correct.

12 MR. LEWIN: I'll see --

13 THE COURT: I was expressing hope rather than correct
14 recollection.

15 MR. LEWIN: Thank you, your Honor.

16 It may be a bit longer than that, I'll be as fast as
17 I can.

18 THE COURT: All right. Go ahead.

19 BY MR. LEWIN:

20 Q. Can I show you DTX 131, please.

21 Do you recognize this as a United States trademark
22 registration, correct?

23 A. I do.

24 Q. And it is for the Thom Browne Grosgrain ribbon, correct?

25 A. Yes, I believe that's right.

N16sADI2

Vanderhoff - Cross

1 Q. OK. And it's in what they call international class 25
2 which includes clothing, correct?

3 A. Yes.

4 Q. All right. And if you look at this with me, can you
5 determine when this trademark application was filed?

6 A. It was filed November 26, 2012.

7 Q. All right. Did this ever come to your attention in 2012?

8 A. It did not.

9 Q. It did not.

10 Have you ever become aware of this registration that
11 we're looking at?

12 A. Again, in the course of this dispute, I became aware of it.

13 Q. And were you reviewing trademark watch service notices in
14 2012?

15 A. We were. Our team was.

16 MR. LEWIN: Your Honor, we would like to move this in,
17 if we can. This hasn't been admitted yet.

18 MR. FLEMMING: No objection.

19 THE COURT: Received.

20 (Defendant's Exhibit 131 received in evidence)

21 MR. LEWIN: Can we publish to the jury?

22 THE COURT: Yes.

23 MR. LEWIN: All right. I'm sorry.

24 BY MR. LEWIN:

25 Q. So this is just to summarize, this is a trademark

N16sADI2

Vanderhoff - Cross

1 application in 2012 during the time you were receiving watch
2 notices that you don't recall ever seeing before this
3 litigation; fair statement?

4 A. We did not receive this in the watch notice, that's right.

5 Q. Well, that's a different -- let me explore that with you
6 for a moment. I thought you weren't sure whether you received
7 them, the watch notices, personally reviewed them in 2012?

8 A. Um, I -- I don't personally receive them, but my colleague
9 does and will send them to me.

10 Q. OK. And if I understand what you're saying is, that didn't
11 happen with respect to this particular trademark application,
12 is that correct?

13 A. Um, we -- this trademark application did not show up on our
14 watch service.

15 Q. And you know that how?

16 A. Because when I became aware of this in the course of this
17 dispute, I went back and checked and it wasn't -- you know,
18 they missed it.

19 Q. Now, you indicated that you spend considerable time and
20 resources monitoring the marketplace, correct?

21 A. Correct.

22 Q. All right. You also indicated, however, that not
23 withstanding what happened in 2007 and 2008, Thom Browne didn't
24 come to your attention until 2018, correct?

25 A. That's right.

N16sADI2

Vanderhoff - Cross

1 Q. And it didn't come to your attention as a result of any
2 sweep, did it?

3 A. Um, no, it did not come to my attention that way.

4 Q. All right. It didn't come to your attention because of a
5 visit to a retail location?

6 A. No.

7 Q. And it didn't come to your attention because of the use of
8 investigators?

9 A. No, it didn't.

10 Q. In fact, it came to your attention because somebody picked
11 up a trademark application made by Thom Browne in Europe,
12 correct?

13 A. That's right.

14 Q. And it wasn't the four-bar that they picked up, it was an
15 application for the Grosgrain ribbon, correct?

16 A. Um, correct.

17 Q. Would it be fair to say that at the time that the
18 information was forwarded to you by your attention in Holland,
19 I think you indicated, that you were not aware of the growth of
20 Thom Browne?

21 A. Um, the growth?

22 Q. Yes, sir. Ma'am, I'm sorry.

23 MR. FLEMMING: Objection, vague.

24 MR. LEWIN: I can be more specific if need be, but
25 I'll wait.

1 Your Honor, I'll rephrase.

2 Q. At the time that you received the information in 2018 that
3 Thom Browne had filed an EU application, you weren't aware of
4 the size of Thom Browne, were you?

5 A. Um, at the time I received the e-mail from my colleague, I
6 didn't know much about Thom Browne.

7 Q. Well, you did know he was a high-end fashion company,
8 though?

9 A. Right.

10 Q. All right. Was that the only information, that information
11 regarding an application for the Grosgrain trademark that you
12 received in 2018 from your various sources monitoring the
13 marketplace?

14 MR. FLEMMING: Objection, vague.

15 MR. LEWIN: I'm trying to move fast, your Honor.

16 A. I believe --

17 THE COURT: So there was an objection.

18 Overruled. Go ahead.

19 MR. LEWIN: Thank you.

20 A. I believe Dana also included information about Thom Browne
21 that she had researched, but I don't recall the specifics.

22 Q. As a result of this issue, you then looked into Thom
23 Browne's products, correct?

24 A. I did.

25 Q. And that was a website review, correct?

N16sADI2

Vanderhoff - Cross

1 A. Um, that's right.

2 Q. And did you send any investigators down to the store at
3 that time?

4 A. No.

5 Q. Did you ask any of the employees of adidas to stop in the
6 store and take a look?

7 A. No.

8 Q. Did you even know where the store was located when you were
9 evaluating the website?

10 A. I'm not sure.

11 Q. Now, I think you said earlier, in evaluating what to do
12 when this comes to your attention, it is merely a website
13 review, correct?

14 A. Well, when I'm evaluating a matter, I consider a lot of
15 different things that I can glean from someone's website.

16 Q. Well, do you consider the products that are being sold?

17 A. Yes.

18 Q. On the website that is, to be clear?

19 A. Yes.

20 Q. And do you look at how the mark is being used, the stripes
21 in question in this instance, how they are being used?

22 A. Yes.

23 Q. All right. Other than looking at the website, did you take
24 any other steps whatsoever in order to make your decision to
25 refer this to outside counsel?

N16sADI2

Vanderhoff - Cross

1 A. Um, I don't recall the timing of ordering product, but we
2 did order products as well.

3 Q. OK. And where did you order those products from?

4 A. I believe from the website.

5 Q. I think you heard, since you've been sitting here with all
6 of us, Mr. Henn referred to finding Thom Browne was like
7 finding a needle in a haystack.

8 Did you hear that statement from your counsel?

9 A. Yes.

10 Q. But you found him this 2006 and 2007, didn't you?

11 A. They came to our attention in 2006.

12 Q. Well, would it be fair to say that in 2018, when it came to
13 your attention again, you knew where he was?

14 A. Um, adidas knew of Thom Browne, yes.

15 Q. And you would agree with me that to lump it together, no
16 one was instructed or there is no evidence that adidas visited
17 the multi-brand department stores alleged to be selling Thom
18 Browne products?

19 MR. FLEMMING: Objection.

20 THE COURT: Ground?

21 MR. FLEMMING: He's asking about basis of evidence.

22 THE COURT: I think the question was a compound
23 question. The first part was no one was instructed and the
24 second part was there was no evidence.

25 MR. LEWIN: I can rephrase it, your Honor.

N16sADI2

Vanderhoff - Cross

1 THE COURT: Please.

2 MR. LEWIN: I'm trying to move quickly.

3 THE COURT: Yes. But you can move quickly, but you
4 still have to abide by the rules of evidence.

5 MR. LEWIN: I understand. I'm still learning, your
6 Honor.

7 BY MR. LEWIN:

8 Q. In 2018, did you instruct anybody to visit the multi-brand
9 department stores alleged to be selling Thom Browne products?

10 A. Um, no, not in connection with this matter.

11 We may have visited department stores in 2018 as part
12 of our regular monitoring efforts, but...

13 MR. LEWIN: I would move to strike everything after
14 "no."

15 THE COURT: Granted.

16 MR. LEWIN: Thank you, your Honor.

17 Q. Now, I think you testified on your direct that Thom Browne
18 wasn't a threat until they moved or expanding or were found to
19 be expanding into sports wear?

20 Forgive the compound again.

21 A. I don't know if I said they weren't a threat. We aren't --
22 they've moved into our product categories by starting to sell
23 athletic-style apparel and footwear.

24 Q. And what is your impression of when they did that?

25 A. We became aware of that in 2018.

N16sADI2

Vanderhoff - Cross

1 Q. Would you consider sweatpants in your area of sales?

2 A. Yes, we sell sweatpants.

3 Q. And would you consider sweatpants to be athletic garments?

4 A. Yes.

5 Q. Nevertheless, adidas was concerned enough in 2006 to write
6 or communicate to Thom Browne his concern over the three bands
7 on a sports jacket, right?

8 A. That's right.

9 Q. And is it your position that four bands on a sports jacket
10 is different than three bands on a sport jacket?

11 A. Yes.

12 Q. If you knew Thom Browne was selling sweatpants in 2010 with
13 four bars on it, would you have taken action at that time?

14 MR. FLEMMING: Objection, speculation.

15 THE COURT: Sustained.

16 Q. Do you consider the collaboration agreement between Thom
17 Browne and the soccer team FC Barcelona to be moving into your
18 area of sales?

19 A. Um, what do you mean by sales?

20 Q. Well, you testified that there was an expansion of Thom
21 Browne -- let me put it this way -- into sports and that that
22 concerned you, correct?

23 A. That's right.

24 Q. All right. So do you consider the collaboration agreement
25 between FC Barcelona, the soccer team, an example of Thom

N16sADI2

Vanderhoff - Cross

1 Browne moving into sports?

2 A. Yes.

3 Q. Would your answer be the same if I asked you about the
4 collaboration agreement between the Cleveland Cavaliers and
5 Thom Browne?

6 A. Yes.

7 Q. And would your answer be the same if I asked you about
8 putting clothing on LeBron James himself?

9 A. Um, it's -- he's an athlete. It suggests sports, yes.

10 Q. So in your view it doesn't matter what the clothes are for,
11 is that correct?

12 A. Um, no. My testimony was that it suggested a move into
13 sports, and a lot of those media articles that I had seen
14 referenced the brand was going to be moving into athletic-wear.

15 Q. But they didn't indicate at all, did they, that they had
16 moved into athletic-wear, correct?

17 A. Um, I -- at the time of the articles, I don't believe so.

18 Q. You're not aware, are you, that Thom Browne has put
19 on-field uniforms on sports teams?

20 THE COURT: Sustained.

21 MR. FLEMMING: Objection.

22 Q. Now, you heard testimony throughout this trial about
23 collaboration agreement between adidas and Gucci, correct?

24 A. Yes.

25 Q. It's your earlier testimony, I believe, that adidas is not

N16sADI2

Vanderhoff - Cross

1 aware of any collaboration product that's ever been marketed or
2 offered for sale without adidas' close oversight, do you
3 remember saying that?

4 A. I'm not sure if you're saying I did. I'm sure I did. I
5 give lots of testimony.

6 Q. Well, if I represented to you that it's in your
7 declaration, your first declaration --

8 THE COURT: No, no. You can show her the declaration.

9 MR. LEWIN: All right. She has it up there.

10 Can you turn --

11 THE WITNESS: You took it back.

12 THE COURT: You took it right back.

13 MR. LEWIN: I have it.

14 Sorry. I'm going to hand you up the document I showed
15 before and ask you to take a look at paragraph 17, if you
16 would.

17 BY MR. LEWIN:

18 Q. Having had an opportunity to review the document I just
19 showed you, does that refresh your recollection that you stated
20 that adidas was not aware of any collaboration marketed or
21 offered for sale without adidas' close oversight?

22 MR. FLEMMING: Objection, improper impeachment. I
23 think the question can be rephrased.

24 THE COURT: Overruled.

25 A. Again, I don't remember my exact words. I think I said

N16sADI2

Vanderhoff - Cross

1 typically, but it is true that we are closely involved in all
2 of our collaborations.

3 Q. And that includes presumably the Gucci collaboration,
4 correct?

5 A. That's right.

6 THE COURT: The declaration that has been
7 referenced --

8 MR. LEWIN: Yes, sir.

9 THE COURT: Excuse me. This is to the witness.
10 -- is something that you presented on behalf of adidas
11 in this litigation?

12 THE WITNESS: Yes.

13 THE COURT: So it's a statement of a party adversary,
14 therefore there is no hearsay exception. Therefore, if you
15 wish, the declaration can be received into evidence.

16 MR. LEWIN: Thank you, your Honor.

17 We'll ask that it be admitted.

18 THE COURT: All right. Why don't you put a number on
19 it.

20 MR. LEWIN: I think we had one, don't we?

21 THE COURT: I think you're up to 900-something.

22 MR. LEWIN: Probably you know better than I, your
23 Honor.

24 Do you have a number? 922.

25 THE COURT: 922. Great. I can't wait for 923.

N16sADI2

Vanderhoff - Cross

1 Received.

2 (Defendant's Exhibit 922 received in evidence)

3 MR. LEWIN: Thank you.

4 BY MR. LEWIN:

5 Q. Now, I think you testified earlier that adidas, that you do
6 not believe that adidas owns the rights to use any number of
7 stripes on apparel, correct?

8 A. That's right.

9 Q. And adidas, in your view, would not own four stripes,
10 correct?

11 A. That's correct.

12 Q. And it wouldn't own the five stripes on a Grosgrain
13 signature, would it?

14 A. Would adidas own?

15 Q. Correct.

16 A. No.

17 Q. That five-color pattern?

18 A. No, we don't own that.

19 Q. OK. And you don't own five or six stripes either, do you?

20 A. No, we don't.

21 Q. I believe you've testified that the mark consists of three
22 parallel stripes, correct?

23 A. That's right.

24 Q. And is that three parallel stripes in any configuration?

25 A. Yes. We own three stripes no matter placement.

N16sADI2

Vanderhoff - Cross

1 Q. So it wouldn't matter if it were a wavy three stripes as
2 long as they were parallel to each other?

3 A. We don't use wavy three stripes.

4 Q. Let me ask that question again.

5 Is it your assertion that adidas has rights that would
6 extend -- withdrawn.

7 That adidas has ownership rights of a wavy three-line
8 parallel design?

9 A. I would need to see what you're talking about because we
10 don't do that.

11 Q. All right. How about what I think you called the hoop
12 design, which is the use of the three stripes in a circular
13 motif?

14 A. Yes.

15 Q. So it's your assertion that whatever rights you have extend
16 to that format, correct?

17 A. Yes.

18 Q. And that would be true with the use of three stripes on the
19 cuffs of a baseball jersey, say?

20 A. Yes.

21 Q. So would you agree with me that at least part of the
22 definition of your Three-Stripe Mark is that the marks are
23 separated, the three lines are separated, or bars?

24 A. Yes, there is space between them.

25 Q. There is space between them.

N16sADI2

Vanderhoff - Cross

1 And sometimes that space is very carefully measured,
2 isn't it?

3 A. Yes.

4 Q. Like in the event of a circular hoop design?

5 A. Um, we have certain dimensions for our stripes -- some of
6 our stripe executions.

7 Q. That is in the ID brand manual that's been admitted
8 already, correct?

9 A. That's right.

10 Q. And if the stripes are being viewed or used -- I want to
11 say the court's term -- squished together, smooshed together,
12 would you consider that a version of --

13 THE COURT: I don't think that was my term. I think
14 it was used by the other side.

15 MR. LEWIN: I know that.

16 THE COURT: Although I did, outside the presence of
17 the jury, admit that my grandmother also uses the term. I
18 don't think that's relevant to it.

19 MR. LEWIN: I stand corrected, your Honor.

20 Q. Can I show you --

21 MR. LEWIN: We're almost done, sir. I think we had
22 the question pending. I'll ask again.

23 Q. If the three lines or stripes are together, squished
24 together with no space in between, would that be a version of
25 your trademark, the Three-Stripe Mark?

N16sADI2

Vanderhoff - Cross

1 A. I would have to see it, but we typically have space between
2 the stripes.

3 Q. Well, imagine the Gucci stripe on the side of sweatpants.

4 You would agree with me that all those colors have no
5 space in between, correct?

6 A. Correct. That's Gucci's trademark, not our Three-Stripe
7 Mark.

8 Q. OK. And if you saw some other mark in that same form,
9 would you consider that their trademark rather than yours?

10 MR. FLEMMING: Objection, calls for speculation.

11 THE COURT: Sustained.

12 MR. LEWIN: I just would like to ask if we can get PX
13 86 up, these. Can you turn to page 29.

14 Q. This has to do, does it not -- withdrawn.

15 Have you seen this page before?

16 A. Yes.

17 Q. All right. And you notice that this indicates, if I'm
18 correct, how far somebody can go off center from vertical, am I
19 correct?

20 A. This is a guideline for our stripes about the angling, yes
21 and the angles that can be...

22 Q. Was this document produced by adidas?

23 A. Yes.

24 Q. All right. And have you seen this in the ordinary course
25 of business?

N16sADI2

Vanderhoff - Cross

1 A. Yes.

2 Q. All right.

3 MR. LEWIN: Your Honor, we would move this one
4 admitted. It's not been accepted yet.

5 THE COURT: Any objection?

6 MR. FLEMMING: I think it was used on direct and it's
7 already in. but no objection.

8 THE COURT: OK. If it's been received, it's in
9 evidence. But if not, it's now received.

10 MR. LEWIN: Correct.

11 We're publishing to the jury?

12 Yes.

13 Q. OK. On page 29, we're looking at a permitted variation
14 from vertical, correct?

15 A. Correct.

16 Q. And does that indicate as well that if you go beyond that,
17 it would be a violation of the instructions contained in this
18 exhibit?

19 A. It would not comply with the guidance, that's correct.

20 Q. If we could turn to page --

21 All right. If you can, would horizontal use of the
22 three-brand mark, as you understand it to be, be a violation of
23 these instructions?

24 MR. FLEMMING: Objection, vague as to three band.

25 THE COURT: No, I'll allow it.

1 You may answer.

2 A. So this is one page of the guidelines, and as we've talked
3 about yesterday, there is another page in this document that
4 specifically permits the horizontal stripes.

5 MR. LEWIN: Turn to page 37, please, of the same
6 document.

7 Q. These are violations of proper use of your Three-Stripe
8 Mark, at least from the view of adidas?

9 A. These are executions that the brand does not -- that the
10 brand doesn't want to see for this time, that's right.

11 Q. OK. Are any of these, as you see them, your three-stripe
12 trademark?

13 A. They all are, yes.

14 Q. OK.

15 A. Just because it says violation doesn't mean it doesn't
16 happen or can't be allowed.

17 Q. Let me call your attention to the shirt, the second shirt
18 in from the left.

19 No, that's three. Yes, thank you.

20 I just want to be clear that if somebody used three
21 bands like this, you would consider it an infringement of
22 adidas' Three-Stripe Mark?

23 MR. FLEMMING: Objection, calls for speculation.

24 THE COURT: Overruled.

25 A. So this stuff that is not about what's infringing, it's

1 about what our -- what executions of the mark our brand wants
2 to see. If someone used the three stripes like this, it would
3 be of concern to us and I would investigate it.

4 Q. Would you consider a possible infringement of your rights,
5 your trademark rights?

6 A. Yes.

7 Q. Now, can we turn to -- I'll withdraw that.

8 Can you turn to page 79, please. Do you recognize
9 this document before today?

10 A. Yes.

11 Q. You've seen this particular page before today, correct?

12 A. Yes.

13 Q. Can you describe for the jury what this page is saying?

14 A. Um, this page is saying that the guidance for branding
15 doesn't want to see these types of executions because they want
16 to make sure the brand is recognizable.

17 Q. And if you look -- let's take the upper right photograph.
18 Can we bring that up.

19 Can you read the line underneath the photo?

20 A. Equal visibility must be maintained if dissecting stripes.

21 THE COURT: What does that mean?

22 THE WITNESS: So I think this means that -- well, this
23 means that when you're using -- when you're executing
24 Three-Stripe Mark in different colors, you need to make sure
25 that they all show up and part of the mark isn't obscured.

N16sADI2

Vanderhoff - Cross

1 So putting that color combination on a white shoe
2 obscures the middle stripe, but it could be acceptable on a
3 different color shoe background, for example.

4 MR. LEWIN: Can we go to PX 56 and pages eight and
5 nine. Let's go to page eight.

6 BY MR. LEWIN:

7 Q. Now, you indicated earlier that adidas does not or want
8 anyone to use a three-stripe variation where one of those or
9 more blends into the background, correct?

10 A. That's right.

11 Q. And this shoe, would you agree with me, resembles a two-
12 stripe configuration, correct?

13 A. It could -- I think I said yesterday, I could see two or
14 three.

15 Q. Well, how do you get to three, ma'am?

16 A. I believe the context was how Thom Browne defines the
17 Grosgrain, which was white red white blue white. So I believe
18 there's a white stripe, from the image you can't tell if you
19 can see that because the background of the shoe are not.

20 Q. Go to PX 195, page one.

21 And you've seen this before today?

22 A. Yes.

23 Q. You would agree with me this is a snapshot taken off the
24 Internet, correct?

25 A. I'm sorry, what?

N16sADI2

Vanderhoff - Cross

1 Q. I said you would agree that this is a snapshot taken off
2 the Internet?

3 A. Um, it's taken off of, I think, Twitter maybe, or
4 Instagram. I'm sorry, Instagram.

5 Q. Instagram is on the Internet, accessible via the Internet,
6 correct?

7 A. Correct.

8 Q. Now, would you agree with me looking down dead center
9 underneath the little heart there's a statement October 10,
10 2020, correct?

11 A. Correct.

12 Q. And that would indicate to you, would it not, that that was
13 the date that this item was posted on Instagram, correct?

14 A. Yes, I believe so.

15 Q. And if you'll look at the bottom of this -- all the way
16 down, thank you -- you'll see a URL.

17 Do you see that?

18 A. Yes.

19 Q. And would you agree with me that URL is a URL directly to
20 that image on Instagram?

21 A. Yes.

22 Q. So if you look at that URL, can you see what the date is?

23 A. Yes.

24 Q. All right. You can see there where it says capture
25 timestamp, correct?

N16sADI2

Vanderhoff - Cross

1 A. Yes.

2 Q. So that would indicate to you, would it not, that that is
3 when adidas captured this?

4 A. Um, I think that that's what this means, that that is when
5 this was captured or visited.

6 Q. Would you agree with me then that these two dates are
7 roughly 14 months apart, the date of publication and the date
8 it was captured by adidas?

9 A. Yes.

10 Q. Can you tell in the span of that 14-month period, can you
11 tell me how many people liked this shot?

12 A. It says 20,094 likes.

13 Q. Now, would you agree with me that there are more people
14 that visit a website than indicate they like the website -- I'm
15 sorry -- more people that visit an Instagram posting than
16 indicate that they like the integral posting?

17 MR. FLEMMING: Objection, speculation.

18 THE COURT: Also, counsel, now you've gone almost
19 20 minutes over your estimation.

20 MR. LEWIN: I apologize, your Honor. I have two more
21 questions.

22 THE COURT: All right.

23 Q. We see one comment on that string of comments that mentions
24 adidas, correct?

25 A. Yes.

N16sADI2

Vanderhoff - Cross

1 Q. You heard testimony about that comment yesterday, didn't
2 you?

3 A. I think I gave it, yes.

4 Q. Do you know who the person is that allegedly posted this?

5 A. No.

6 Q. Did you take steps to find out who it was?

7 A. No, I did not.

8 Q. So it's possible this could have been an adidas employee,
9 correct?

10 MR. FLEMMING: Objection, speculation.

11 THE COURT: Sustained.

12 Q. Let's go to page two of this same exhibit, please. Can we
13 open that up.

14 You've seen this before today, right?

15 A. Yes.

16 Q. You testified on this one, right?

17 A. Yes.

18 Q. And would you agree with me that the number of likes are
19 20,094?

20 A. Yes.

21 Q. And that the publication date is October 10, 2020?

22 A. Yes.

23 Q. All right. And did you take steps to scroll down and read
24 any further comments that were on this particular posting?

25 A. I can't remember. I know I looked at a lot of them.

N16sADI2

Vanderhoff - Redirect

1 Q. OK. So it would be fair to say you and your team reviewed
2 a lot of postings regarding Thom Browne clothes before
3 selecting these for trial?

4 A. Um, we reviewed, yes, a lot of postings.

5 MR. LEWIN: I have no further questions, your Honor.

6 THE COURT: All right.

7 Redirect.

8 MR. LEWIN: Thank you for the extra time. I
9 appreciate it.

10 REDIRECT EXAMINATION

11 BY MR. FLEMMING:

12 Q. Hello again, Ms. Vanderhoff. I have a few questions.

13 MR. FLEMMING: Can we start, Nita, with Exhibit 56,
14 page eight, which was one of the last exhibits we just looked
15 at, plaintiff's exhibit. And page eight. Thank you.

16 Q. Do you remember looking at this page just now?

17 A. Yes.

18 MR. FLEMMING: Can we zoom in on that first shoe,
19 please, Nita.

20 Q. Is adidas alleging in this case that this is a proper
21 execution of the Three-Stripe Mark?

22 A. No.

23 Q. Is adidas alleging that this is an exact replica of the
24 Three-Stripe Mark?

25 A. No.

N16sADI2

Vanderhoff - Redirect

1 Q. What is adidas alleging in this case about this design?

2 A. We believe this design was confusingly similar to our
3 Three-Stripe Mark.

4 MR. FLEMMING: Thank you. You can take that down.

5 Nita, can we look at Plaintiff's Exhibit 86, please.

6 Q. How about page 29, do you remember testifying about this
7 page?

8 A. Yes.

9 Q. I would like to ask you about that text in red to the left,
10 do not use horizontally.

11 Why use such strong language in red in branding
12 guidelines?

13 A. I think I talked about this a little bit yesterday, but
14 it's just a way to get people's attention when we have
15 designers sitting all over the world designing products. So it
16 is meant to catch their attention so that they know, if they
17 want to do something that isn't permissible in this document,
18 they need to get approval.

19 MR. FLEMMING: Thanks. Can you zoom out again, Nita.
20 And let's go to the next page. And the next page.

21 Q. Ms. Vanderhoff, what types of stripes are specifically
22 authorized on the page we're looking at?

23 A. This guideline is permissible to horizontal stripes that we
24 call hooped three-stripe execution. So three stripes executed
25 in a horizontal manner around sleeves and pants, specifically

N16sADI2

Vanderhoff - Redirect

1 collars, cuffs, socks, waistbands, sleeves, and pant legs.

2 MR. FLEMMING: Thanks, Nita. You can take that down.

3 Q. On cross, did you testify that you didn't send anyone to
4 Nordstrom to look at Thom Browne's products?

5 A. Yes.

6 Q. Did you order Thom Browne's products so that you could
7 physically inspect them?

8 A. Yes.

9 MR. FLEMMING: Can we bring up Defendant's Exhibit
10 131, please.

11 Q. Do you remember testifying about this registration?

12 A. Yes.

13 Q. Do you remember testifying about the watch notices that
14 they missed it?

15 A. Yes.

16 Q. Can you tell us who missed it?

17 A. Our watch service Thomson, when we asked them about this,
18 they just missed it.

19 Q. So outside of the watch service, how could adidas have
20 found out about this specific registration?

21 A. We couldn't have.

22 Q. Could you have specifically searched for Thom Browne on the
23 PTO website?

24 A. I could have done that, or I could have searched, I guess,
25 every day's filings every day.

N16sADI2

Vanderhoff - Redirect

1 MR. FLEMMING: You can take that down. Thanks, Nita.

2 Q. At Kilpatrick, about how many -- the law firm, our law
3 firm -- about how many adidas matters were you involved in?

4 A. Countless.

5 Q. Can you name one?

6 A. Um, any one?

7 Q. Any one of them?

8 A. Payless, Target, yeah.

9 Q. So let's say Payless.

10 About how many e-mails were you copied on in the
11 Payless matter?

12 A. Probably thousands.

13 Q. Can you think of any adidas matters that you were actually
14 involved in that you were only copied on a single e-mail?

15 A. No.

16 Q. You talked on cross about how adidas resolves its trademark
17 disputes.

18 Do you remember in opening opposing counsel,
19 Mr. Maldonado, describing adidas as a bully?

20 A. Yes.

21 Q. How did adidas usually resolve its trademark disputes, if
22 there is a dispute?

23 A. The vast majority of our cases are resolved -- are resolved
24 before trial. We very rarely have to file lawsuits and very
25 rarely do they ever go to trial.

N16sADI2

Vanderhoff - Redirect

1 Q. Opposing counsel also raised litigations that adidas has
2 filed.

3 How many of those went to trial?

4 A. Um, since 2001, one. Only one has gone all the way to
5 trial without resolving beforehand.

6 Q. And what case was that?

7 A. That was Payless.

8 Q. What were --

9 MR. LEWIN: Objection, your Honor.

10 THE COURT: There will be limits, but the door was
11 clearly opened to a lot of this on cross, as I'm sure everyone
12 on counsel table was aware. So that doesn't mean that
13 everything is now fair game, but a lot is.

14 Overruled.

15 Q. I'll try to ask you a couple of yes-or-no questions.

16 Did that trial go to a verdict?

17 A. Yes.

18 Q. What year was that?

19 A. 2008.

20 Q. Was the verdict publicized at all?

21 A. Yes.

22 Q. Can you generally describe the nature of the products at
23 issue in that case?

24 MR. LEWIN: Objection, your Honor.

25 THE COURT: Overruled.

N16sADI2

Vanderhoff - Recross

1 A. Payless involved two, three, and four-striped footwear.

2 MR. FLEMMING: Thank you, your Honor.

3 THE COURT: Anything else?

4 MR. LEWIN: Couple of quick ones, your Honor.

5 THE COURT: Go ahead.

6 RECROSS EXAMINATION

7 BY MR. LEWIN:

8 Q. The Payless case didn't involve clothes, did it?

9 A. It involved footwear.

10 Q. Only footwear, right?

11 A. Yes.

12 MR. LEWIN: Now can we have Plaintiff's Exhibit 86,
13 page 29, please.

14 Q. Do you recall testifying to this a moment ago, right?

15 Your explanation for the statement 'do not use
16 horizontally' is that it was a warning, is that correct?

17 A. I don't think I used the word 'warning,' but it's meant to
18 get people's attention.

19 Q. Why?

20 A. Because these guidelines are meant to, um, ensure that our
21 brand is recognizable across all of our product offerings, and
22 we have so many people in different locations, they need to
23 have some guardrails around what they can do.

24 Q. Would you agree with me it's telling people not to use this
25 iteration horizontally?

N16sADI2

Vanderhoff - Recross

1 A. Um, well, the -- this -- yes, it's saying do not use
2 horizontally. This is about angling. And, you know, other
3 pages in this document allow the same stripes in a horizontal
4 manner.

5 MR. FLEMMING: Your Honor, I would move to strike the
6 answer as not responsive.

7 THE COURT: No. I think given previous answers, that
8 was reasonably responsive.

9 Overruled.

10 Q. You testified a moment ago that you had received only one
11 e-mail concerning the matter of Thom Browne and adidas early
12 on, correct?

13 A. Yes.

14 Q. While you were at Kilpatrick, correct?

15 A. Yes.

16 Q. Is it your testimony that you did nothing in response to
17 that e-mail?

18 A. I didn't receive an e-mail. I sent an e-mail.

19 Q. Right, I'm sorry.

20 Is it your testimony that you were not engaged in
21 anything concerning Thom Browne when you sent that e-mail?

22 A. I don't know. I just don't have any recollection of what
23 was in the e-mail. I'm sorry.

24 Q. Fair enough.

25 You indicated that you -- the vast majority of

N16sADI2

Vanderhoff - Recross

1 litigation that you did in your particular area of protecting
2 the mark was settled by settlement agreement prior to trial,
3 correct?

4 A. Yes.

5 Q. And is it your view that because of settlement agreements,
6 adidas is not being seen as a bully?

7 A. Um, I don't know how adidas is being seen. I don't view us
8 as a bully. We're very thoughtful in what we do.

9 MR. LEWIN: No further questions, your Honor.

10 THE COURT: Anything else?

11 MR. FLEMMING: None, your Honor.

12 THE COURT: You may step down. Thank you very much.

13 (Witness excused)

14 I want to remind the jury that nothing that either
15 counsel said in opening statements is evidence, and whether a
16 company, a person, or entity is a bully or not a bully is
17 completely irrelevant to any issue you have to decide in this
18 case. What you have to decide is whether there was an
19 infringement or dilution or not. So I allowed those questions
20 because there was no objection, but I feel compelled to tell
21 you it is completely irrelevant.

22 Time for our morning break. 15 minutes. Thank you.

23 (Continued on next page)

N16sADI2

Vanderhoff - Recross

1 (Jury not present)

2 THE COURT: I should add that, in my estimation, the
3 right to bully is solely reserved to the court.

4 All right. See you in 15 minutes.

5 (Recess)

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N16Qadi3

Joachimsthaller - Direct

1 (Jury not present)

2 MR. HENN: I don't believe we ever formally read the
3 list for the last witness. Before we move forward, the
4 admitted exhibits were 181 through 184, 1314, Plaintiff's 191
5 through 195, Plaintiff's 197, Plaintiff's 176 and then
6 Plaintiff's 693, 694, 705, 706, 707 and 708. That also
7 includes the one Mr. Lewin offered on cross. With the upcoming
8 witness, we have stipulation to Exhibit 283.

9 THE COURT: Very good. Let's get the witness on the
10 stand.

11 (Plaintiff's Exhibits 181 through 184, 1314, 191
12 through 195, 197, 176, 693, 694, 705, 706, 707, 708 and 283
13 received in evidence)

14 (Jury present)

15 ERICH JOACHIMSTHALER,

16 called as a witness by the Plaintiff,

17 having been duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. FLEMMING:

20 DEPUTY CLERK: State your name and spell it slowly for
21 the record.

22 THE WITNESS: My name is Erich Joachimsthaller. And I
23 spell it, E-R-I-C-H. My last name is
24 J-O-A-C-H-I-M-S-T-H-A-L-E-R.

25 THE COURT: Go ahead, counsel.

N16Qadi3

Joachimsthaler - Direct

1 BY MR. FLEMMING:

2 Q. Good morning, Dr. Joachimsthaler.

3 A. Good morning.

4 Q. If I call you Dr. J occasionally, is that okay?

5 A. Absolutely.

6 Q. Dr. Joachimsthaler, will you please introduce yourself to
7 the jury?

8 A. I'm Erich Joachimsthaler. I was born originally in
9 Germany. I am since 2008 American citizen. I actually was --
10 I became an American citizen around here and maybe even this
11 building. I am a former professor. I wrote books. I'm an
12 author. And I have a company. I'm a consultant mostly on
13 brands. And I live in Chelsea for many years now. And I have
14 three children.

15 Q. Dr. J, what is your role in this case?

16 A. In this case I was asked to opine on the brand of adidas
17 and how three stripes relate to adidas and how -- and the
18 potential harm that -- and the harm that Thom Browne causes to
19 that brand.

20 Q. I understand you helped prepare a slide show for the jury
21 to follow along with your testimony?

22 A. Yes.

23 Q. I'm going to bring up Dr. Joachimsthaler's demonstrative
24 which the parties have agreed can be shown to the jury but just
25 as a demonstrative. And you remember my colleague Nita Gray.

N16Qadi3

Joachimsthaler - Direct

1 She is going to be helping us with the slides. Nita can you go
2 to slide 2.

3 Dr. Joachimsthaler, will you give the jury a quick
4 summary of the opinions you're offering in this case?

5 A. Yes, I opine on adidas and the brand. I have evaluated the
6 evidence, the empirical evidence in the case, and I analyzed
7 the extent or to what extent adidas is a brand and a strong
8 brand and how three stripes becomes part of that brand, is very
9 close to the brand.

10 And the second part is I analyzed from the point of
11 view of marketing and the part of view of consumer psychology
12 how a brand is harmed like adidas through those actions that
13 are here at issue with Thom Browne.

14 Q. Since you're here as an expert, I'd love to know more about
15 your background. Can we go to the next slide.

16 Tell us briefly about your education.

17 A. Yes. I studied originally in Germany here at the
18 university of Giessen-Friedberg. From there I went to
19 Frankfurt. I studied economics. I got a scholarship to
20 University of Kansas, and I got stuck there, I should say. I
21 did a master's degree there, then I did my doctorate there
22 where I studied quantitative methods in marketing and
23 psychology, and then surprise, surprise, I was invited to
24 become a Doctor of Fellow at the Harvard Business School in
25 Boston.

N16Qadi3

Joachimsthaller - Direct

1 Q. What did you do after you left Harvard professionally?

2 A. After I left Harvard, I became a professor and, I went
3 through a normal track of various years. Almost 15 years I did
4 that full time. And then on the top of it, I also started a
5 few companies, two companies in fact.

6 Q. And what do you do now?

7 A. Right now I still -- I have a third company that I started
8 in 1999 here in New York City, and that company is called
9 Vivaldi, and I consult on brands with that company.

10 Q. About how many employees does Vivaldi have?

11 A. In the market we are over one thousand people around the
12 world distributed in 258 countries, but the part I founded, my
13 part is about 150 people specializing on brands basically.

14 Q. Can we go to the next slide.

15 Since you say you specialize in brands, will you
16 please tell us about or name some of your clients since you've
17 been at Vivaldi?

18 A. They're right here. Boeing is actually the company I
19 started a long time ago. American Express a long-time client.
20 Coca-Cola also. BMW I did a lot of work over the years --

21 MR. LEWIN: Objection, your Honor.

22 THE COURT: I think we've had enough. Let's move on.

23 Q. All right. A simple question: Have you ever worked with
24 any brands in the apparel and footwear industry?

25 A. Yes.

N16Qadi3

Joachimsthaller - Direct

1 Q. Let's go to two slides forward. Thank you.

2 You mentioned earlier that you're an author. Will you
3 please tell us about your publications?

4 A. Yes. I have three major books written. The first book --
5 they are listed here.

6 Q. Do you have any publications in peer reviewed journals?

7 A. Yes.

8 Q. Can you name any of the publications for us?

9 A. Yes, of course. One is called consumer -- *Journal of*
10 *Consumer Research*, which is a consumer psychology journal.

11 Another one is called *Journal of Marketing Research*. That one
12 is more focused on research and surveys. *Journal of Marketing*,
13 *California Management Review*, *Loan Management Review at MIT*,
14 *Harvard Business Review* and onwards.

15 Q. Have you ever testified as an expert in a trademark case?

16 A. Yes.

17 Q. About how many times?

18 A. Maybe 75 times, around there.

19 Q. What about at trial, have you ever testified in trial of a
20 trademark case?

21 A. Yes.

22 Q. About how many times?

23 A. About maybe 25 times.

24 Q. Let's go to the next slide.

25 Are these some of the brands that you've represented

N16Qadi3

Joachimsthaler - Direct

1 in trademark litigations?

2 A. Yes, these are more recent cases that I've been involved
3 in.

4 Q. You can take that down, Nita.

5 Dr. Joachimsthaler, will you please summarize your
6 credentials when it comes to consumer psychology?

7 A. Consumer psychology is a central part of marketing. You
8 need to understand consumers. So I trained academically when I
9 was a doctoral student. I took social psyche classes in the
10 doctoral program, and over the years I have taught consumer
11 psychology. I've done research. I've published in major
12 journals in consumer psychology, and it's a central part of
13 everything I do in my work. My company Vivaldi always starts
14 from understanding consumers deeply and how and why they buy.

15 Q. Let's bring up Plaintiff's Exhibit 283. Let's go to the
16 next page.

17 Dr. Joachimsthaler, is this a copy of your CV or
18 résumé?

19 A. Yes.

20 Q. Nita, can you scroll through it quickly.

21 Dr. J, if someone wanted to learn more about you, does
22 this provide more background on your work, experience, and your
23 publications and experience?

24 A. Excuse me?

25 Q. Does this provide background on your education and work

N16Qadi3

Joachimsthaler - Direct

1 experience and publications?

2 A. Yes. Yes. There's a long list of things.

3 Q. You can take that down.

4 Dr. Joachimsthaler, let's talk about branding. So
5 first, what is a brand? Can you give us a definition, please.

6 A. Sure. A brand is -- there is a technical version of that.
7 A brand that is in our world use, a brand is a name and a
8 symbol that identifies a product. But the brand from my world,
9 a brand is something that is in consumers head. Brand is not
10 what this gentleman here has a New Balance shoe --

11 MR. LEWIN: Objection, your Honor.

12 THE WITNESS: Huh?

13 THE COURT: Hold on.

14 I think he's answered the question as put. You can
15 put another question.

16 Q. Dr. Joachimsthaler, what are the elements of a brand?

17 A. The elements -- there are two elements of a brand. One
18 part is called tangible elements and one part is called
19 intangible elements.

20 Q. What are tangible elements of a brand?

21 A. Tangible elements are a name or a symbol. And that's
22 usually in consumers mind. It's almost like there is a box in
23 consumers mind, a drawer with a name on it, or it's a symbol.
24 That's the tangible element.

25 Q. What are intangible elements of a brand?

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Joachimsthaller - Direct

1 A. Intangible elements of a brand is the way to think about
2 the drawer again, the way everything that is stored in
3 consumers mind, those are intangible elements. And that could
4 be when I open my drawer and I look at my drawer, that could be
5 an attribute, it could be an experience, that could be -- when
6 I think of Nike, I think of Michael Jordan or I think of Tiger
7 Woods, anything that I store in my memory or that a consumer
8 stores in memory. Even when I think of if you're old enough, a
9 gesture --

10 MR. LEWIN: Objection.

11 THE COURT: When there's an objection, you need to
12 stop.

13 THE WITNESS: Okay. Absolutely.

14 THE COURT: Again, I think he's answered the question.
15 Put another question.

16 MR. FLEMMING: Thank you, your Honor.

17 Q. Since you're also here to talk about harm to the adidas
18 brand, I want to ask you a little bit about the business of
19 branding. Can you briefly tell us why companies care so much
20 about branding?

21 A. Well, companies care about branding because it's one of the
22 most important assets of a firm. It determines the value of a
23 company. Number two, companies care for that because consumers
24 use that drawer in their head the brand when they make purchase
25 decisions or when they search for information online or when

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Joachimsthaler - Direct

1 they go to a store and they want to decide whether to buy or
2 not or whether to learn more about a brand, they look at what's
3 in the drawer in what we call a brand so --

4 Q. So we talked about some of the things that businesses
5 really care about when it comes to branding, but this case is
6 about adidas and Thom Browne. Can you describe your overall
7 opinions on the adidas brand?

8 A. Well, adidas is a brand that is one of the historically a
9 very, very important brand. It's one of the all-time great
10 brands. There is not a survey that would not rank adidas in
11 one of the top hundred brands in the world.

12 MR. LEWIN: Objection, your Honor.

13 THE COURT: Sustained.

14 Q. Nita, can you please bring up slide 8.

15 Dr. J, earlier you talked about tangible and
16 intangible elements of brands. What are the tangible elements
17 of the adidas brand?

18 A. The tangible elements here identify as the name adidas and
19 the Three-Stripe Mark.

20 Q. And based on your research, what are the intangible
21 elements of the adidas brand?

22 A. The intangible elements are -- there are many, but the most
23 important ones are something about let's call it --

24 MR. LEWIN: Objection, your Honor. Foundation.

25 THE COURT: I haven't heard the answer yet, so you may

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Joachimsthaller - Direct

1 finish your answer.

2 A. The intangible elements are sports credibility, something
3 called authenticity, authentic, and inclusivity.

4 THE COURT: Overruled.

5 Q. Before we move on to this, can you please give us a brief
6 explanation and maybe an example of what you mean by sports
7 credibility?

8 A. Sports credibility means that you have been a brand that
9 operates in the world of sports and that that is something you
10 earn over time. When you work with athletes, you might have
11 developed a shoe or apparel for athletes, even though some
12 non-athletes like myself would wear them. Sports credibility
13 is about being associated with maybe sport events, with having
14 particular technology and performance, a quality to the product
15 that athletes would use. It is probably global events
16 sometimes as well. U.S. in America, NFL, NBA.

17 Q. Sorry to interrupt you. I want to get through this list
18 really quickly. What about authenticity? Can you give us a
19 definition of authenticity, maybe an example of a brand being
20 authentic?

21 A. Yes. So authenticity is really the word is really
22 something about being true to yourself. So a sports brand that
23 consistently delivers on the performance for athletes, let's
24 say. A sports brand that is associated with major athletes or
25 with people that are associated with it. That's what would be

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Joachimsthaller - Direct

1 authentic.

2 Q. What do you mean by inclusivity here?

3 A. Oh, inclusivity is interesting. Inclusivity or being
4 inclusive is being -- the opposite being exclusive. A brand
5 that embraces everything, that everybody -- a brand that sort
6 of --

7 MR. LEWIN: Objection, your Honor.

8 THE COURT: Counsel come to sidebar.

9 (Continued on next page)

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Joachimsthaller - Direct

1 (At the sidebar)

2 THE COURT: So we have here a witness, not untypical
3 of many expert witnesses, who feels that he needs to give the
4 history of the universe in response to any given question, and
5 he needs to be more narrow and precise in his responses. So
6 maybe you want to whisper in his ear just to keep it shorter,
7 but otherwise the questions are fine. Just the answers go on
8 too long.

9 MR. MALDONADO: Your Honor may I ask a question? I
10 thought earlier we shouldn't refer to these witnesses as
11 experts, or is that okay?

12 THE COURT: No, you can call them experts if you want.
13 You will see in my charge I refer to them as specialized
14 witnesses. My point is what you shouldn't do, and you haven't
15 done, is ask the Court to accept him as an expert on X, Y or Z,
16 which is the way you had to proceed, but no longer.

17 (Continued on next page)

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N16Qadi3

Joachimsthaler - Direct

1 (In open court)

2 THE COURT: Go ahead.

3 BY MR. FLEMMING:

4 Q. Nita, can you bring up the next slide please.

5 Dr. Joachimsthaler, I'd like to talk to you about
6 brand equity or strength. What are some factors that
7 professionals in your industry use to measure the strength of a
8 brand?

9 A. We use three factors to measure what's in consumers head,
10 and that is in that proverbial drawer, and that is awareness,
11 associations and loyalty.

12 Q. Since we're here to talk about the adidas brand first, I
13 want to know how adidas performs along those three dimensions.
14 Based on your research, how does adidas perform on the
15 awareness dimension on strength of a brand?

16 A. Adidas has a very strong awareness.

17 Q. And what is that opinion based on?

18 A. I have researched empirical research that was available to
19 me or surveys that was conducted by adidas. I also researched
20 surveys that are done by firms outside of adidas or independent
21 or third-party marketing research firms, and I did even my own
22 research over the years.

23 Q. I want to talk about associations next, and really quickly,
24 what do you mean by associations in this context?

25 A. Yes, associations is a word that is what is linked or

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Joachimsthaler - Direct

1 associated with a name or symbol in consumers mind and what's
2 in the drawer basically. Everything that I mentioned earlier
3 are associations, feelings, attributes, perceptions.

4 Q. What were the three that you mentioned earlier in
5 connection with adidas?

6 A. There are three of them: Sports credibility, authenticity
7 and inclusiveness, being inclusive.

8 Q. I'd like to show you Exhibit 44.

9 Dr. J, did you rely on this study in performing your
10 expert opinions in this case?

11 A. Yes.

12 Q. Let's go to page 5. Page 5 of the last exhibit. Thank
13 you, Nita. Can we focus on the I guess right third of this --
14 actually, let's look at this right now.

15 Dr. Joachimsthaler, what does this research tell you
16 about -- what did this research tell you about consumers'
17 associations with adidas?

18 A. This one, the title here says brand image drivers, so all
19 this association together that's actually called also in
20 layman's terms an image. What it shows is how strong adidas is
21 on certain attributes, or image drivers they call them, or
22 associations.

23 Q. And what were the strongest ones in the study?

24 A. On this study, if you go all the way to the right side.

25 Q. Let's zoom in on that, Nita.

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Joachimsthaler - Direct

1 A. On the right-hand side, yes. That is what is -- gray is
2 adidas and the other colors are other brands in the business.
3 And it shows that adidas is strongest on authenticity and
4 purpose it says here.

5 Q. A quick clarification. It has Reebok in light gray and
6 adidas in dark gray. Do you see that?

7 A. Yes.

8 Q. When we're looking at the larger gray boxes here, is that
9 the adidas?

10 A. Yes, the larger grays are adidas. It's sort of all the way
11 on the -- you can't see it right now on this chart. You see
12 here. It's a darker gray. This part, yes.

13 Q. Can you bring up Exhibit 47, please.

14 Dr. Joachimsthaler, did you rely on this study in
15 forming your expert opinions?

16 A. Yes.

17 Q. Let's turn to page 8. I would like to draw your attention
18 to those three white boxes with red texts in the beginning and
19 ask you what did this study tell you about what consumers
20 associate with adidas?

21 A. Again, this one also is about the image and the
22 associations, and it says that there are three things primarily
23 associated with adidas: Heritage, three stripes and openness,
24 might be -- it's another word for inclusiveness.

25 Q. Nita, can you zoom in on the second bullet point on the

N16Qadi3

Joachimsthaler - Direct

1 bottom.

2 And that be second bullet point says, "Sense of
3 accessibility and inclusivity is an underlying strength of the
4 brand." Do you see that?

5 A. Yes.

6 Q. Did you rely on that in forming your expert opinions about
7 what consumers associate with the adidas brand?

8 A. Yes.

9 Q. Let's bring back the PowerPoint presentation you made and
10 look at slide 10 again.

11 Are these the only attributes that you believe that
12 are associated with the adidas brand?

13 A. No. There are many more in consumers mind.

14 Q. Could a brand have too many attributes in consumers' minds?

15 A. Not necessarily. Sometimes yes, but the key is that you
16 have some focus on a few. In my book, I wrote that you need to
17 have -- you should focus on three to five and no more, but
18 there are many more in consumers mind depending on the
19 consumer.

20 Q. We talked about -- let's bring back up slide 9. We talked
21 about awareness. We talked about associations. We haven't
22 talked about loyalty yet. What did your research show about
23 how adidas performs on the loyalty dimension of strength, brand
24 strength?

25 A. Relative to competitors and other brands, adidas is very

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Joachimsthaler - Direct

1 strong on loyalty.

2 Q. What are some ways that you can measure loyalty of a brand?

3 A. Well, the way you will measure loyalty is in one way how
4 much people repeat purchase a brand. But the other way is to
5 how much a brand will be recommended. You know, I will
6 recommend this brand to my friends or to others. So we usually
7 use loyalty in various ways to measure sort of the strengths of
8 affinity on loyalty.

9 Q. Is there a way that professionals in your field can measure
10 the degree that a brand is going to be recommended by people
11 who purchase their product?

12 A. Yes, we do surveys. There are surveys done, yes.

13 Q. Let's look at Exhibit 45. Let's go to page 32.

14 Dr. Joachimsthaler, what does this empirical research
15 tell you about loyalty as an attribute of adidas?

16 A. Well, this is a survey that was conducted recently on the
17 attributes that people associate with adidas. And what you see
18 here in this chart are the numbers that have -- the attributes
19 that has the highest number for adidas is a brand I recommended
20 or a brand recommended, it says here.

21 Q. Can you zoom in on that, please, Nita at the top of that
22 graph.

23 A. So you see it's close to 60 or between 50 and 60 there, and
24 that means that adidas scores extremely high, higher than on
25 many other attributes on this one thing, a brand that I would

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Joachimsthaler - Direct

1 recommend to somebody else.

2 Q. Nita, you can take that down.

3 Dr. Joachimsthaler, are you familiar with a net
4 promoter score?

5 A. Yes.

6 Q. What is that?

7 A. A net promoter score is called NPS, net promoter score. It
8 means the number of people that would recommend a brand to
9 others.

10 Q. And what is the range for net scores?

11 A. All brands have today the ranges go from minus 100 to
12 positive 100, so it's a big range.

13 Q. What does it mean if a brand is in the negative side of the
14 range?

15 A. If it's in the negative side, so from zero to negative 10,
16 that means people, more consumers leave the brand than actually
17 stay with the brand. That means they have no loyalty.

18 Q. So in this loyalty scale for NPS, where would a brand with
19 okay loyalty score?

20 A. Well, an okay brand would be around maybe 20. So they have
21 some loyalty, but a number 20 would be a good one, a positive
22 number 20.

23 Q. What did your research yield with adidas's score?

24 A. Adidas's score is 46.

25 Q. Can you put that into context for us?

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Joachimsthaler - Direct

1 A. 46, it's not as good as Apple, which is higher up there, 70
2 maybe, but it's almost as close as Nike, and it's as good as
3 the best brands you can get. So most of the brands are at that
4 high level.

5 MR. LEWIN: Objection, your Honor.

6 THE COURT: Overruled.

7 Q. Dr. Joachimsthaler, since you just mentioned Nike, can
8 adidas be a strong brand when Nike is in the same segment?

9 A. Of course.

10 Q. How is that?

11 A. Because I might have a strong association, name and symbol
12 associated with Nike and with adidas, and both of them can be
13 very strong and in many different ways too, just like it is.

14 Q. We talked a lot about adidas brand and strength. I'd like
15 to talk to you about the Three-Stripe Mark which we've been
16 hearing a lot about this week. So where does the Three-Stripe
17 Mark fit into this discussion about the adidas brand?

18 A. Well, the Three-Stripe Mark is this very important symbol
19 that is outside the drawer of consumers that is associated with
20 the --

21 MR. LEWIN: Objection, your Honor. Foundation.

22 THE COURT: I assume this is in his report?

23 MR. HENN: It is.

24 THE COURT: Overruled.

25 Q. So you were describing the role of the Three-Stripe Mark.

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Joachimsthaler - Direct

1 Can you finish your thought?

2 A. It's the symbol three stripes is associated with the adidas
3 name. It's like what we call synonymous. It's almost the
4 same. It's interchangeable.

5 THE COURT: Are you saying that any time someone sees
6 any three stripes of any kind, they associate it with adidas?

7 THE WITNESS: Not always, but many times. My research
8 shows that when they see three stripes, they associate -- and
9 sometimes less than three stripes.

10 THE COURT: So, for example, in the old days,
11 prisoners in a federal penitentiary would have uniforms with
12 three stripes across the uniform. You think that would be
13 associated with adidas?

14 THE WITNESS: So, the way it works, Judge, is that
15 when consumers see three stripes, they go in their head through
16 their eyes, in their head they search for a pattern. It's an
17 automatic consumer response, memory response, and they search
18 for pattern that matches closely to what they have just seen.
19 They do that because they want to organize information that
20 they see. And so if there was -- if in those days a consumer
21 or a prisoner has in their head already established the three
22 stripes, and they see the three stripes on the uniform, then
23 they are likely invoking the memory in this drawer that I'm
24 talking about, about adidas. It's not always like that, but
25 that's how it works.

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Joachimsthaller - Direct

1 THE COURT: By the way, when you say that's how it
2 works, are you a psychiatrist?

3 THE WITNESS: Not a psychiatrist, but I have studied
4 cognitive psychology, so memory research is something I know
5 about.

6 THE COURT: Isn't it true that many of the premises of
7 cognitive psychology are subject to debate?

8 THE WITNESS: Well, you know, cognitive psychology
9 started in 1850 around with Ebbinghaus, and the basics of those
10 principles of cognitive psychology are still valid even today,
11 and one of the things is that consumers --

12 THE COURT: When you say they're still valid --

13 THE WITNESS: Yeah.

14 THE COURT: -- what's the error rate?

15 THE WITNESS: So we cannot -- we never -- this is sort
16 of very important, and I'm glad you asked the question
17 because --

18 THE COURT: My pleasure.

19 THE WITNESS: We can never -- we obviously cannot open
20 up a consumer's head and see, but what happens is the error --
21 we get -- over the years, we got better and better and better.
22 For example, 20, 30 years ago and today we ask consumers, when
23 you think of Nike, what comes to your mind? If you're a golf
24 player, you say Tiger Woods, let's say. And in the old days,
25 we just could assess the brand like that.

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Joachimsthaler - Direct

1 Today, the error rate has gone down a lot because my
2 son, for example, studies at Stanford University, and he uses
3 fMRI, which shows when you say Tiger Woods --

4 THE COURT: Forgive me for interrupting, but so fMRI
5 and cognitive neuroscience, which is a relatively recent
6 development is different, is it not, from the principles you're
7 relying on, which are primarily from an earlier era?

8 THE WITNESS: Not really. It's just that the
9 measurements are -- what we do in our world right now in
10 consumer psychology we do fMRI studies. It's just more
11 expensive. In the practical world of adidas and Nike and in
12 the business of this, you oftentimes don't have the access to
13 fMRI. You rely still on the traditional. But what's important
14 is the fMRI has not invalidated the traditional approaches to
15 measurement. They have just made it more accurate sometimes.
16 It's almost like validating the research.

17 THE COURT: Go ahead, counsel.

18 BY MR. FLEMMING:

19 Q. Dr. Joachimsthaler, did you personally conduct any
20 quantitative research into consumers' associations between the
21 Three-Stripe Mark and the adidas brand?

22 A. Yes.

23 Q. Dr. Joachimsthaler, one of the issues in this case is the
24 fame of the Three-Stripe Mark under the trademark dilution
25 statute. The research you did, was it regarding fame?

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Joachimsthaller - Direct

1 A. No.

2 Q. Please describe the quantitative research that you did.

3 A. I wanted to know how strongly three stripes is associated
4 with adidas, so I asked over 2,000 consumers. It's a large
5 sample. And I presented them with a very neutral shirt with
6 the three stripes on the arm. And then I asked them, what
7 brand do you -- what name comes to your mind or who put that
8 out? And then they answer.

9 Q. I'd like to know, did you follow generally accepted
10 methodology for such research?

11 A. Yes, as I always do in my research, and I've done for many
12 years now, over 30, I follow sort of the standard principles
13 of --

14 MR. LEWIN: Objection, your Honor.

15 THE COURT: Overruled.

16 Q. Can you name some of the standard principles that you
17 followed with this particular research you conducted?

18 A. Yes. One is you need to have a large sample size, a lot of
19 consumers. Another one is you don't want to ask questions that
20 are leading, that are suggestive. You want questions that are
21 neutral. Number three, sometimes people when you ask these
22 kinds of questions, they like to guess rather than really know.
23 And in order to do that, we use something called a control
24 group. So those kind of things I have done.

25 Q. And I believe the jury has heard about a control group in a

N16Qadi3

Joachimsthaler - Direct

1 survey in this trial. In your questions, were you giving the
2 takers multiple choice answers they could choose from?

3 A. Yeah. Well, multiple choice would be leading because if I
4 suggest the possible multiple choice, it makes it easier. I
5 try to make it more conservative and hard. So I just had a box
6 where people had to actually write in there what do they see,
7 what brand they see. So it's a little bit more difficult.
8 There was a lot of misspellings of the adidas name.

9 Q. Earlier you testified that these were generally accepted.
10 How do you know they are generally accepted in the community?

11 A. Well, for two reasons: One is there are principles of
12 survey research that I should have been teaching for years in
13 the university. But on the other side, there are also
14 guidelines for -- I think guidelines that are used in the court
15 of law, federal guidelines by an author called Shari Diamond,
16 actually, from Chicago.

17 Q. About how many surveys have you conducted in your career?

18 A. Oh my God, over a hundred. More than I dare to remember.

19 Q. I'd like to just, Dr. Joachimsthaler -- can you show him
20 Exhibit 285, please? Go to the second page.

21 I think I made this difficult by doing a presentation
22 and exhibits. So I apologize for the delay.

23 Dr. Joachimsthaler, is this the study that we were
24 just talking about that you conducted?

25 A. It's not on my screen yet. This is the questionnaire that

N16Qadi3

Joachimsthaler - Direct

1 I used.

2 MR. FLEMMING: I offer this one into evidence, your
3 Honor.

4 THE COURT: Is there any objection?

5 MR. LEWIN: Your Honor, can we see the first page?

6 THE COURT: This has been furnished to defense counsel
7 previously. Yes?

8 MR. LEWIN: I believe so, your Honor.

9 MR. FLEMMING: But they might not have it in front of
10 them.

11 MR. LEWIN: Thank you very much. This is okay, your
12 Honor. No objection.

13 THE COURT: Received.

14 (Plaintiff's Exhibit 285 received in evidence)

15 BY MR. FLEMMING:

16 Q. Dr. Joachimsthaler, can you see it on the screen?

17 A. Yes.

18 Q. Can we publish this?

19 THE COURT: What's the number on this?

20 MR. FLEMMING: This is Exhibit 285.

21 Q. Is this be published to everyone? Great.

22 Dr. Joachimsthaler, just to confirm this is the
23 research that we were just discussing, right?

24 A. That's right.

25 Q. I have a question about this page. The text in red were

N16Qadi3

Joachimsthaler - Direct

1 the test-takers or survey-takers. Do you see that?

2 A. No. Those are just instructions for the researcher.

3 Q. Let's go to the next page, please. Just briefly what are
4 these questions we're looking at?

5 A. These questions are qualifying questions. We call them
6 sort of educational level: Where are you working.

7 Q. Let's look at page 4. Zoom in a little bit so we can see
8 the products. I want to see the text a little better.

9 Please explain to the jury what we're looking at on
10 this page.

11 A. This is phrase of the question order of what we call test
12 group of questions. This is what I explained earlier when I
13 said, I asked -- I showed people consumers the various four
14 brands in this case. One of them is the three stripes on the
15 arm, on the sleeve as you see.

16 Then I ask the question here in bold, you see in the
17 middle: What band do you think makes this long-sleeve shirt?
18 What I mentioned earlier is this open box where people had to
19 write in the name that comes to mind, and that's what this
20 says.

21 Q. Let's go to the next page. Can we zoom in? Thank you.

22 Will you please explain to the jury what's on this
23 page?

24 A. This is the same one, but so from the 2000 consumers, half
25 of them I showed this page and the other half the other page

N16Qadi3

Joachimsthaller - Direct

1 and in this one I made a slight change to the shirt as you see
2 here. It's only one stripe. And I asked the same question.
3 And what's interesting also I should note here is that I used
4 this question here on the bottom. If the person doesn't know
5 what this is, they can say they don't know the brand. So I'm
6 not looking for a particular answer. I actually -- if they
7 don't know it, they can just say, like I mentioned earlier with
8 the question here from the judge, then we just say I don't
9 know. So that's an important part. It's a conservative way of
10 measuring how three stripes links together in consumers' minds
11 with the name adidas.

12 (Continued on next page)

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N16sADI4

Joachimsthaler

1 BY MR. FLEMMING:

2 Q. The question was otherwise the same to the test group,
3 right, just different images?

4 A. Yes.

5 Q. Just one different image?

6 A. Just one image that is different, and that is on the left
7 side here, the one stripe or the three stripes.

8 Q. Part of this prompt says there is no right or wrong answer,
9 if you do not know a certain brand, please also tell us that.
10 This information is just as important to us as whether or not
11 you recognize the brand.

12 Do you see that?

13 A. Yes.

14 Q. Why include that in your prompt?

15 A. I think it's important that, again, you try to not solicit,
16 you do not try to lead consumers, they need to know the answer.
17 That's why there is no right or wrong answer. They can choose
18 anything. It's important.

19 Q. Why did you choose -- why did you choose this particular
20 design for the control, the one stripe?

21 A. I used the one stripe because, um, again, this is sort of a
22 way for us to think about -- this is not part of the case here,
23 one stripe. So by using a one stripe, it's kind of an
24 effective control. If people guess that that's sort of how I
25 estimate the degree of guessing that takes place because one

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Joachimsthaler

1 stripe could be anything, really. It can't be adidas.

2 MR. FLEMMING: You can take that down. Thank you,
3 Nita.

4 Nita, just show to Dr. Joachimsthaler and the court
5 Exhibit 286.

6 This one is a native Excel file, your Honor, so paper
7 copies aren't readily available. Let me just show it on the
8 screen.

9 I would like to go ahead and offer it to see if
10 there's an objection.

11 MR. LEWIN: There's an objection here, your Honor. We
12 don't see the relevance to this survey.

13 MR. FLEMMING: Can we approach?

14 THE COURT: Yes. Let's have a sidebar.

15 (Continued on next page)

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N16sADI4

Joachimsthaler

1 (At the sidebar)

2 THE COURT: So what's the relevance?

3 MR. HENN: Dr. Joachimsthaler's opinions as set forth
4 in his report around harm and dilution are based on the notion
5 that because the Three-Stripe Mark and adidas are so closely
6 linked in a consumer's mind, when they see Thom Browne they
7 make an association, and that weakens the adidas brand. That's
8 the fundamental basis of this whole opinion.

9 So this is the quantitative survey he conducted to
10 show the consumer's memories, three stripes and adidas are
11 linked so that then he can go talk about the next stages of his
12 opinions, which is his whole opinion in the case, that was in
13 his report and there was no Daubert motion or anything.

14 THE COURT: But this chart --

15 MR. HENN: It's just the results.

16 THE COURT: -- is the results of three stripes versus
17 one stripe.

18 MR. HENN: Right.

19 So he's explained to the jury that he did that as a
20 control so the three-stripe results were -- I forget what the
21 number was -- say 70 percent of people said adidas when shown
22 three stripes. He didn't just rely on that. There might have
23 been guessing and other things. He did a separate control for
24 one stripe and he subtracted anybody who said adidas in
25 response to one so he could get a clean read on how closely the

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Joachimsthaller

1 three stripes are associated with adidas.

2 He explained all that.

3 THE COURT: I think there can be cross-examination
4 about that.

5 MR. HENN: Of course.

6 THE COURT: I think that is admissible.

7 Overruled.

8 (Continued on next page)

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Joachimsthaler

1 (In open court)

2 THE COURT: All right. What was the number again?

3 MR. FLEMMING: 286, Plaintiff's.

4 THE COURT: We're only up would 286.

5 MR. FLEMMING: Skipping a lot.

6 THE COURT: 286 is received.

7 (Plaintiff's Exhibit 286 received in evidence)

8 MR. FLEMMING: Thank you, your Honor.

9 Can you publish it to everyone, Nita.

10 BY MR. FLEMMING:

11 Q. Mr. Joachimsthaler, what is the exhibit that we're looking
12 at?

13 A. That's actually the results from the tabulated results from
14 the survey.

15 Q. OK. So before we actually look at the final results, can
16 you tell me which set of results are on the left side of the
17 screen?

18 A. The left side, as it says here, is the test group, those
19 who have seen the three stripes. And then the answers is here,
20 you see in the rows the answers that they gave.

21 Q. Then on the right side of the screen is the control?

22 A. That's where you see the control, when they just saw the
23 one stripe on shirts.

24 Q. Let's scroll down a bit and see the total results for the
25 test group. You can stop right there.

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Joachimsthaler

1 Dr. Joachimsthaler, based on your survey, what
2 percentage of the respondents in the test results saw the three
3 stripes and wrote in adidas or some spelling of adidas?

4 A. So over the 1,000 people, 707 said adidas or some spelling
5 thereof. It's about 68, almost 70 percent.

6 Q. And what about the control group, those who saw the one
7 stripe, what percentage said adidas?

8 A. Those who said adidas is about 168 only out of over 1,000,
9 and it's about 16.1 percent.

10 Q. Let's bring back up the presentation and we can skip ahead
11 to slide 13.

12 Dr. Joachimsthaler, now that we have the results from
13 the test group and we have the results from the control group.

14 What is the next step in your calculations?

15 A. So in order to make this conservative, sort of as true as
16 possible, you subtract the guessing from the three stripes
17 group from the control -- the test group.

18 So the guessing sort of is the lowest score, so you
19 subtract it. You see that here.

20 Q. Please tell us the results.

21 A. So you see --

22 Q. Put everything on the screen.

23 A. Yeah, thanks. So we don't have to do math.

24 So it's 68.4 percent, the number from those who have
25 seen the three stripe minus the one stripe test group or

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Joachimsthaler

1 control group, and sort of the net, the net result is
2 52.3 percent or over 50 percent associate very closely adidas
3 with three stripes.

4 Q. So with your background in branding and consumer psychology
5 and all of your research, what conclusions did you draw from
6 the survey?

7 A. Well, the conclusion here is that this is a relatively high
8 number, mainly that the conclusion is that three stripes is
9 essentially synonymous or the three stripes invokes the adidas
10 name. That's basically what it says.

11 Q. Just a couple more questions about these types of surveys.

12 Can you tell us the difference between an aided
13 awareness survey and/or an aided survey and unaided survey?

14 A. Yes.

15 Q. Aided is when you give people multiple choice questions.
16 Aided is when you aid them, and what happens then in aided
17 awareness, the scores get very high, 90 percent or something.

18 Unaided is what I did here. Unaided means I just ask
19 them to put a type and name into the box. That's cognitively
20 very difficult. You actually have to retrieve in memory that
21 box or to draw where you have --

22 MR. LEWIN: Objection, your Honor.

23 A. -- what you have written on it.

24 THE COURT: Overruled.

25 A. And so unaided awareness is oftentimes a very conservative,

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Joachimsthaler

1 a lower estimate, and the true read is somewhere in between.

2 So this is a very high number.

3 Q. Were you surprised by this result?

4 THE COURT: Sustained.

5 A. No.

6 THE COURT: Sustained.

7 Q. In your research, did you uncover any other evidence
8 suggesting the degree to which consumers associate the
9 Three-Stripe Mark and adidas?

10 A. Well, we know -- we know for many years that adidas has
11 been associated with three stripes.

12 Q. Why?

13 MR. LEWIN: Objection, your Honor.

14 THE COURT: Yes.

15 The question is: In your research, did you uncover
16 any other evidence suggesting --

17 THE WITNESS: Yes.

18 THE COURT: -- suggesting the degree to which
19 consumers associate the Three-Stripe Mark and adidas?

20 I think that's a yes-or-no question.

21 What's the answer; yes or no?

22 THE WITNESS: Oh, yes.

23 THE COURT: OK. Put another question.

24 BY MR. FLEMMING:

25 Q. What evidence did your research reveal?

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Joachimsthaler

1 A. The evidence shows, from other empirical research and other
2 survey research, that the three stripes --

3 MR. LEWIN: Objection, your Honor.

4 A. -- associated --

5 THE COURT: I'm sorry. Ground?

6 MR. LEWIN: Vague.

7 THE COURT: Overruled.

8 Go ahead.

9 Q. I believe we're just trying to get to what other evidence
10 you reviewed said about associations between adidas and the
11 Three-Stripe Mark.

12 If you can just continue. Thank you.

13 A. Yes. There is enormous -- there is a significant amount of
14 empirical survey research that will show the same thing, mainly
15 that the three stripes is associated with adidas. That's why.

16 MR. LEWIN: Objection, your Honor. No foundation.

17 THE COURT: Overruled.

18 Q. Thank you, Dr. Joachimsthaler. I think you've answered
19 this question many times, so I won't belabor the point.

20 Can we bring up slide 14, please.

21 Dr. Joachimsthaler, are you familiar with these two
22 designs that we are looking at now?

23 A. Yes.

24 Q. How did these two designs factor into your opinion, if at
25 all, about the association between adidas and the Three-Stripe

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Joachimsthaler

1 Mark?

2 MR. LEWIN: Your Honor, we have to object to the title
3 on this slide.

4 MR. FLEMMING: There was no objection lodged before
5 when we conferred about this.

6 THE COURT: Overruled.

7 A. Um, these are two logos that are used by adidas, and that's
8 another way that adidas uses to identify the products and their
9 assortment of products.

10 Q. What effect do these logos have on associating adidas as a
11 brand with three stripes?

12 A. Well, the important part is that these two logos used by
13 adidas also, or is a part of it, the stripes, the three stripes
14 logo. So it's important that from a branding point of view,
15 that a consumer can recognize three stripes not only through
16 stripes maybe on a leaf, but also through a logo, like a swoosh
17 in a Nike example.

18 MR. LEWIN: Your Honor, we have to object. These are
19 not in the case.

20 THE COURT: Counsel, let's have a sidebar.

21 (Continued on next page)

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1 (At the sidebar)

2 THE COURT: First, I already denied the defendant's
3 motion in limine on this. That doesn't mean that new, more
4 particularized objections can't be made. But most of the
5 objections I've heard so far seem to take no cognizance of my
6 prior ruling.

7 Second, an expert can, of course, refer to the studies
8 and opinions done by others. Indeed, that's most of what
9 experts usually rely on. And as long as it is reflected in his
10 or her expert report, the expert is free to explain to the jury
11 why he used this or what he thought they showed.

12 So I am really totally mystified at some of these
13 objections. Overruled.

14 (Continued on next page)

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Joachimsthaler

1 (In open court)

2 BY MR. FLEMMING:

3 Q. Dr. J, so we can get just one clear answer on this
4 question, I'll just ask it one more time.

5 What affect do these two logos have on consumer's
6 associations between the adidas brand and three stripes?

7 A. The effect is that these logos reinforce the association
8 between the three stripes and adidas.

9 MR. FLEMMING: You can take that down, Nita.

10 Q. Dr. Joachimsthaler, does the fact that the Three-Stripe
11 Mark is composed of stripes, a common design, does that weaken
12 its strength as a visual identifier for the adidas brand?

13 A. No.

14 Q. Why not?

15 A. Um, because it's commonly used. And when we design symbols
16 all over, we use common -- common lines, many times, for
17 brands.

18 Q. Based on the materials you reviewed and your education and
19 your experience, what is your expert opinion on the strength of
20 the Three-Stripe Mark as a visual identifier for the adidas
21 brand?

22 A. Well, in summary, the Three-Stripe Mark is a very, very
23 strong visual identifier of the adidas brand, of its products,
24 yes.

25 Q. In your opinion, how long has that been the case?

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Joachimsthaler

1 A. Well, it's been many years. When I was ten years old, my
2 first training suit -- we call them training suits --

3 THE COURT: Can I go back to --

4 Let me ask you. If I understood what you're saying,
5 you're saying that if there is one mark that is like an
6 original configuration, a cartoon character that has never been
7 created before or something like that, and then there's another
8 mark which takes something that people see all the time in
9 other contexts, namely stripes, but now there are three
10 stripes, that the fact that the second mark is composed of
11 something that people see every day doesn't make it any less
12 strong than something they only see ever in their life
13 associated with this just one product?

14 THE WITNESS: Yes, it doesn't make it less strong.
15 What it means --

16 THE COURT: What's your basis for that?

17 THE WITNESS: Because -- because, um, consumers, when
18 they -- this is what we call Gestalt. That is one of the
19 principles.

20 THE COURT: Yes. So I studied under Solomon Asch. I
21 understand Gestalt psychology. He was the founder in the
22 United States.

23 Go ahead.

24 THE WITNESS: And it goes back to Ebbinghaus in 1850.
25 And consumers, they don't really count stripes. What they do

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Joachimsthaler

1 is they see a piece of something and make an inference. They
2 see something in a Gestalt, in a holistic way. So it doesn't
3 make it less strong.

4 What it means, Judge, is that it makes it a lot harder
5 for you to create that association with adidas. So if you take
6 common lines, they can be as strong as something very unique
7 that only exists once. But the common lines are just much
8 harder to build in consumer's mind uniquely with adidas.

9 So that is what my studies showed that adidas, in all
10 these years, actually accomplished this common lines to
11 associate it with adidas, which is good.

12 THE COURT: Go ahead, counsel.

13 MR. FLEMMING: Thank you, your Honor.

14 BY MR. FLEMMING:

15 Q. We were talking about timing and how long. I know you
16 personally have been familiar with adidas, familiar with adidas
17 for a while.

18 But in a professional respect, how long do you believe
19 that adidas has been associated so strongly with the Three-
20 Stripe Mark?

21 A. Again, many years. But at least since 2005.

22 Q. Why that year specifically?

23 A. Well, I remember I reviewed a study that actually showed
24 already back then, that's 15, 18 years ago, that adidas is
25 synonymous with three stripes.

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Joachimsthaler

1 Q. Let's bring that up very quickly.

2 MR. FLEMMING: Nita, that is exhibit 50 and it's
3 already in evidence. We'll turn to page 28.

4 Q. Is this the 2005 study you were talking about?

5 A. Yes.

6 Q. Please explain to the jury --

7 MR. LEWIN: Objection.

8 Q. -- what this shows.

9 THE COURT: Ground?

10 MR. LEWIN: I'll withdraw.

11 MR. FLEMMING: There was no objection.

12 THE COURT: OK.

13 A. This one shows that if you see that a bold in the middle
14 there called logo and lettering, it shows that 71 percent
15 associate three stripes -- actually one below, 65 percent --
16 associate the three stripes with adidas.

17 Q. And that was in 2005?

18 A. That was in 2005.

19 MR. FLEMMING: Let's go to the next page, page 29.

20 I think we were just on 28. Nita, you can take that
21 down.

22 Q. So we talked a lot about marketing and branding, but you
23 also have an extensive background in consumer psychology.

24 So based on all of your research and background, were
25 you able to form an opinion about how consumers perceive the

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Joachimsthaler

1 adidas brand in their own minds?

2 A. Yes.

3 Q. Please walk us --

4 MR. FLEMMING: Let's put up slide 15.

5 Q. Would you please walk us through how you were able to form
6 your opinion on how consumers perceive adidas in their own
7 minds?

8 A. This is actually that draw that I mentioned earlier, which
9 has a name and a logo or symbol in front of the draw. And what
10 you see here is how a consumer -- how the draw actually is
11 organized in consumer's mind and what's in there, thoughts,
12 attributes. Here on the left side, feelings, experiences.

13 And what is sort of important here is that the memory
14 of a consumer is organized as a network. So when I think of
15 Nike, I think of Tiger Woods. When I think of Tiger Woods, I
16 think of Augusta National, golf, things like that.

17 So the network operates -- the memory, it's not like a
18 cluttered draw, it's actually a network. There are linkages,
19 and this is what we call a memory network.

20 Q. So, Dr. Joachimsthaler, based on all of your research, were
21 you able to create a similar visual representation of a memory
22 network for the adidas brand?

23 A. Yes.

24 Q. Let's look at slide 16.

25 Earlier we talked about tangible elements of a brand.

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Joachimsthaler

1 We also talked about intangible elements of a brand.

2 Do you remember that?

3 A. Yes.

4 Q. Would you please using this visual tell us where the
5 tangible elements of the adidas brand are?

6 A. Yeah. So the tangible elements here are bolded of adidas,
7 and you see that in the middle there, three stripes. Then you
8 see the networks of intangible elements or associations that
9 are coming around. That's how that is organized.

10 Q. I would like to cull out the three at the bottom -
11 authentic inclusive, and sport credibility.

12 Were those the ones we were discussing earlier?

13 A. Yeah.

14 Q. Would you please explain why they are where they are in
15 this representation?

16 A. So what you see here is that you need to look at the
17 linkage. Number one, how closely they are associated with the
18 name adidas or the bubble. And authentic is very close to
19 adidas. Inclusive and sports is close. Sports credibility
20 goes closely with three stripes. That is one thing you look
21 at.

22 The other thing you look at, let's say authenticity on
23 the left side. You look at what are the linkages. So it goes
24 to sports. Authentic is something that you earn over time, it
25 is like the heritage. But authentic also means it's part of

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Joachimsthaler

1 being inclusive. That's the adidas brand.

2 So you look at the linkages and how closely they are
3 connected to each other.

4 Q. So why would celebrities be off at the top sort of by
5 itself, just really briefly?

6 A. Well, you see, celebrities is a little bit further away
7 because adidas is associated with celebrities like Beyonce, for
8 example, but I think primary you see the direct link goes to
9 real athletes - Messi, Mohammad Ali, and so forth.

10 And celebrities, of course, is a little bit further
11 distance. Still connected, but not a direct connection.

12 Q. Dr. Joachimsthaler, at the beginning of your testimony you
13 also said that you were here to talk about harm to the adidas
14 brand. I would like to talk about that now.

15 Would you please quickly summarize your expert
16 opinions on the issue of harm?

17 A. Yes. So if I identify four, five areas of harm in my
18 report, there are many more that I could analyze with more
19 time. But I looked at four major areas of harm.

20 Q. Before we dig into those areas, what are the bases for your
21 opinions on harm?

22 A. OK. The basis of the opinion on harm is my own survey, my
23 own empirical research I've done, then the research done by a
24 third party for adidas or by adidas. But also harm is
25 something that has been studied in my field for many, many

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1 years. Companies are interested, you know, whether they are
2 brand is doing well and what causes harm. And companies like
3 myself help companies, brands, to work on remedying harm
4 issues.

5 Q. Did you study harm from a consumer psychology perspective?

6 A. Yes.

7 Q. What about from a branding perspective?

8 A. I studied from both sides, from a consumer psychology
9 perspective, how a network, for example, like this is affected,
10 but also from a marketing perspective; what it means for a
11 business, you know, to attract customers and to retain
12 customers, for example.

13 Q. Since we have this one on the screen, I would love to start
14 with the consumer psychology aspect of your testimony on how
15 Thom Browne was harming the adidas brand.

16 Can you use this image to explain at a high level some
17 of the consumer psychology principles you applied in this case?

18 THE COURT: Before you do that, because I'm unclear
19 and the jury may be unclear, this image that's on the screen,
20 this is not a picture of a brain, is it; yes or no.

21 MR. FLEMMING: That is to you, Dr. Joachimsthaler.

22 THE WITNESS: Yes, that's a brand.

23 THE COURT: That's a brain?

24 THE WITNESS: Brand.

25 THE COURT: No, brain, b-r-a-i-n.

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Joachimsthaler

1 MR. FLEMMING: Brain.

2 THE WITNESS: This is how --

3 THE COURT: No. Answer that yes or no.

4 THE WITNESS: This is not a brain.

5 THE COURT: Thank you.

6 Now, but it purports to show how memory operates
7 within the brain, right?

8 THE WITNESS: Correct.

9 THE COURT: And how did you arrive at the spacing
10 between the various ovals on this chart?

11 THE WITNESS: You look at existing research, like a
12 research where you ask consumers what comes to your mind when
13 you think of adidas, and the spacing is determined -- if they
14 say athletes, then the spacing gets closer to adidas. If they
15 say -- if celebrities doesn't come up, then I put it further
16 apart.

17 So the closer these -- the closer these bubbles are to
18 the adidas brand, the closer that signifies that consumers say
19 adidas and then they say heritage or authenticity.

20 THE COURT: All right. So this is really an
21 arithmetic chart, if I understand what you're just saying.
22 You're saying that, in an answer to your survey, that was an
23 association by the consumers who answered the survey and there
24 was a greater association between three stripes and adidas than
25 there was between celebrities and adidas.

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Joachimsthaler

1 THE WITNESS: Yes, correct.

2 THE COURT: So what are the numbers?

3 What was the number for celebrities?

4 THE WITNESS: So the percentage?

5 THE COURT: Yes.

6 THE WITNESS: Oh, I wouldn't know anymore. This is
7 not just on one survey, this is produced from a number of
8 surveys, a number, and so...

9 THE COURT: All right.

10 THE WITNESS: Yeah.

11 THE COURT: Go ahead, counsel.

12 BY MR. FLEMMING:

13 Q. Dr. Joachimsthaler, what market research by adidas did you
14 review in arriving at this conclusion?

15 A. No, I would like --

16 THE WITNESS: Can I still answer something?

17 THE COURT: Go ahead.

18 THE WITNESS: Which is a very interesting question,
19 because one way to reflect your thought on number of
20 celebrities is to draw bigger circles or smaller circles.
21 Like, for example, there are -- if there are fewer celebrities
22 associated with adidas, let's say, then maybe the bubble itself
23 should be smaller than for athletes. I didn't draw it that way
24 because many celebrities actually wear adidas shoes, and so you
25 don't know whether they are sponsored or not sponsored.

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Joachimsthaler

1 So there is celebrities. Athletes generally are
2 associated with adidas. That's why the bubbles are the same.
3 But I could have reflected your thought of number, the strength
4 of it, not just the linkage, the strength of it through a
5 sizing of the bubble. It's a very good point.

6 THE COURT: Thank you. I don't have any thoughts.
7 I'm a judge. I just ask questions.

8 Go ahead, counsel.

9 BY MR. FLEMMING:

10 Q. Dr. Joachimsthaler, does adidas track or does adidas
11 conduct surveys into the attributes that consumers associate
12 with the brand?

13 A. Yes.

14 Q. How much research is there that you reviewed?

15 A. Oh, there is enormous amount of research. Every
16 three months adidas is doing a study of very similar nature.

17 Q. So if you could put a number on how many studies you
18 reviewed of that nature, can you give me a ballpark?

19 A. Oh, maybe two hands full, so over 20.

20 Q. OK. So we were talking about walking through some
21 principles of consumer psychology which we are talking a lot
22 about.

23 Can you use this to walk us through some of the
24 specific principles that you're relying on in this case?

25 A. Yeah. Well, we mentioned earlier Gestalt. I think what is

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Joachimsthaler

1 important, which perhaps should be mentioned, is the key to
2 Gestalt is -- and this is so important for branding -- is that
3 you don't always see the three stripes. What you see is a
4 fragment. And from that fragment, the brain operates and sees
5 something holistically, and that invokes then the adidas brand.

6 You know, like with McDonald's, when you see yellow
7 and an M and you are hungry, guess what you think about? I
8 think of McDonald's, and I think it's automatic. And the key
9 to that is that this operates how this operates. You're not
10 always consciously thinking about something.

11 But I know, for example, this gentleman here --

12 MR. FLEMMING: Wait. We don't have to talk about the
13 people in the room.

14 THE COURT: Excuse me.

15 MR. FLEMMING: Please continue but without talking
16 about those of us in the room.

17 THE COURT: They are very shy.

18 A. Yeah. I think it's important that you're not always
19 processing something consciously, like I am reading here then
20 blue. Oftentimes the way this operates is memory -- is that
21 sometimes it's just a fragment. Maybe you do something else
22 and you still -- this has an impact on your memory. It may
23 remind you of something or you see something while you're doing
24 something else, and you process it and put that into your draw,
25 in the right drawing, and make sense out of it in your head.

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Joachimsthaler

1 Q. So we've talked about how consumers look at things
2 holistically and process things consciously and unconsciously,
3 as you said.

4 A. Yeah.

5 Q. Let's pause for a second because we're also here to talk
6 about Thom Browne.

7 Did you conduct research into what attributes are
8 associated with the Thom Browne brand?

9 A. Yes.

10 Q. What did you do?

11 A. Well, I didn't have a survey research available, but I did
12 research it. I went online. I researched it quite
13 extensively. It's a good brand to research. It's 20 years
14 old. I went on Pinterest, I went on Instagram, I looked on
15 Google. And I looked on empirical research, survey research,
16 or any other research that I could find to understand Thom
17 Browne.

18 Q. Did you review any internal Thom Browne documents?

19 A. No.

20 Q. Based on your research, were you able to come up with a
21 similar visual for the Thom Browne brand?

22 A. To the best I could, I tried to do that, yes.

23 Q. Let's put up the next slide, please.

24 Dr. Joachimsthaler, in your expert opinion, what are
25 the most significant differences between the attributes of the

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Joachimsthaler

1 adidas brand and the attributes of the Thom Browne brand?

2 A. Um, you can see here the Thom Browne brand. And when you
3 look at this again, try to do this in a holistic way in some
4 ways, it's not perfect, but Thom Browne is about luxury. It's
5 an American designer. Thom Browne is about the four stripes.
6 There is some people that know maybe Grosgrain ribbon.

7 Thom Browne is a luxury, but also a fashion. It's a
8 fashion statement in some ways. It's about exclusive, being
9 exclusive. Being luxury. Being very specific in some ways. A
10 particular style. When you research Thom Browne, you learn
11 also that they are theatrical for fashion shows. You could
12 think about some products associated. So that's the Thom
13 Browne association.

14 My opinion to your question, that is very different
15 from what you see when you look at adidas. Thom Browne is
16 exclusive. Adidas is inclusive. Thom Browne is luxury.
17 Adidas is for everybody, it's inclusive. They have a campaign
18 called All In.

19 So if you look holistically, if you just look at them,
20 they are very different brands. One is a designer, fashion
21 brand, respected, luxury brand. One is a brand that you and I
22 can buy every few months, if you will.

23 Q. Dr. J, how did you use principles of consumer psychology to
24 measure how Thom Browne is harming the adidas brand in this
25 case?

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1 A. So the way you look at consumer psychology is that
2 consumers, what they do is when they see, let's say, the
3 four-stripe from Thom Browne, just like you mentioned earlier,
4 the first thing you do, you see four stripes, and then what you
5 do is see only fraction of it. Then consumers go in their
6 memory and they match what they see in memory. The way you
7 understand consumer psychology is that that match then takes
8 place.

9 Q. Can we go to the next slide, please.

10 Please continue.

11 A. So is there a question?

12 Q. Yes, how Thom Browne -- I believe you're talking about
13 seeing four stripes.

14 What happens then?

15 A. Yeah. So what I've -- from my research, I know when
16 consumers see four stripes or Grosgrain ribbon, what happens is
17 they invoke actually three stripes. They invoke --

18 Q. Let me stop you right there, Dr. Joachimsthaler.

19 How do you know or why do you believe that consumers
20 would see four stripes with a Grosgrain and see three stripes
21 and think adidas?

22 A. Well, I know it because we have available empirical
23 original research, so survey research.

24 Q. Let's go to the next slide please, and I would like to talk
25 more about this evidence.

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Joachimsthaler

1 Dr. Joachimsthaler, when you said we have empirical
2 evidence, were you referring to the Poret study?

3 A. Yeah. I think you call it Poret study, perhaps.

4 Q. And we heard from Hal Poret yesterday.

5 Would you please explain what that research meant to
6 you in your harm analysis?

7 A. To me, actually, in the way we do it on ordinary business,
8 it showed it matched what you just saw earlier. Namely, those
9 red lines between Thom Browne, four stripes and Grosgrain
10 ribbon and the adidas three stripe, which means that the survey
11 basically presented -- as you know, they presented Thom Browne
12 product with Thom Browne's four stripes, but consumers actually
13 invoked the adidas brand. When they went in and patent search
14 in their head, they said, oh, that's a three-stripe.

15 MR. LEWIN: Objection, your Honor. The document
16 speaks for itself.

17 THE COURT: Well, I'll allow it.

18 But did you explore the underlying methodology of this
19 study?

20 THE WITNESS: Yes.

21 THE COURT: For example, to what extent did he correct
22 for problems some consumers would have with their vision?

23 THE WITNESS: Um, there is -- I don't know. I would
24 have to go into the detailed study, but there is -- the firm
25 that the panel -- it's called a panel firm that Poret and

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Joachimsthaler

1 others researchers use. Typically, in order to qualify for
2 that, they -- um, they have certain dimensions. One of them is
3 the vision issues, that in order to qualify that you actually
4 are a member of the panel.

5 So I don't know specifically how Mr. Poret looked at
6 it, but typically that is something we, as market researchers,
7 try to sort of control for.

8 THE COURT: So are you familiar, for example, with a
9 well-known scientific study called My Cousin Vinny?

10 MR. FLEMMING: The movie.

11 THE WITNESS: Winnie the Pooh?

12 THE COURT: No. This is a movie. And in the movie
13 the eyewitness, the alleged eyewitness has a vision problem,
14 and the defense counsel goes to the back of the room and holds
15 up two fingers and says to the eyewitness: How many fingers?
16 The judge then interrupts and says: Let the record reflect
17 that there were two fingers raised. The defense lawyer gives
18 him the appropriate look, and the judge says: Start again.
19 And he then puts up, again, two fingers. And the witness says
20 four fingers because her vision is poor.

21 So just to state the obvious, wouldn't it be very
22 important to know whether Mr. Poret corrected for vision, so
23 people who were saying they associated four stripes with adidas
24 maybe only saw three?

25 So did you check that out?

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Joachimsthaller

1 THE WITNESS: No. I would have to research, look at
2 the study again. This is not my study.

3 THE COURT: OK.

4 THE WITNESS: That's a really important point, but the
5 way -- there could be an error such as this. But my
6 experience, these numbers are so high that, yes, it could
7 affect the results, but still --

8 THE COURT: You think it would not affect the overall?

9 THE WITNESS: I wouldn't. I don't think so. I think
10 that these numbers are really high numbers in terms of, that's
11 why.

12 THE COURT: All right.

13 THE WITNESS: Otherwise, I think this is really --
14 this is really something to look at. I agree with that.

15 BY MR. FLEMMING:

16 Q. Dr. Joachimsthaller, what do you make of some of the
17 verbatim answers to the Poret study where respondents answered
18 adidas, and when asked why, they wrote in three stripes?

19 A. Yeah, that's really interesting. I think in particular to
20 the conversation we just had, that the memory -- again, this
21 goes to the finding that also I had in my study. They said,
22 what I see is, I look at --

23 This is crazy. I look at Thom Browne four stripes, I
24 see adidas. That's what they say. When you ask them, Why do
25 you say adidas? They say, Three stripes. You know, to the

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Joachimsthaler

1 point that you just made, they saw three stripes even though --

2 MR. LEWIN: Objection, your Honor.

3 THE COURT: I'll allow it.

4 Go ahead.

5 THE WITNESS: Even though they saw four stripes. It's
6 exactly the Vinny example here. It's powerful.

7 This is, again, it just means that the three stripes
8 is very closely associated with adidas and four stripes invokes
9 adidas.

10 BY MR. FLEMMING:

11 Q. And did you review some social media posts in your
12 research?

13 A. Yes.

14 Q. And is this an example on the right side of the screen?

15 A. Yes. You see this quite a number of times.

16 Q. So when we were talking about seeing four stripes and that
17 triggering adidas and a memory network, how does social media
18 comments like this fit into your analysis?

19 A. Well, they just are validation to the survey research that
20 I did. It's basically real-world evidence.

21 Q. Let's go to the next slide.

22 THE COURT: Stop. Stop. I apologize for
23 interrupting.

24 So the people who actually saw four stripes but
25 reported that they saw three were having, in effect, a kind of

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Joachimsthaler

1 illusion or some sort of memory problem or whatever.

2 But that could be caused by any of many possibilities,
3 could it not?

4 THE WITNESS: Yes, and it's what -- this is what we
5 call cognitive biases, and there are 25 of them. I can't go
6 into those. But over the years now, we have established the
7 fact that consumers make mistakes. They make -- so these are
8 errors or biases.

9 Sometimes you can research them, but there is a number
10 of reasons that why consumers make those mistakes. We are not
11 perfect computers or information processors.

12 THE COURT: So once they think they have seen three
13 stripes, even though they've seen four, then they are being
14 asked to associate it with some company. And they, of course,
15 say adidas, but I'm not sure what that shows.

16 THE WITNESS: Well, that's the most important point,
17 because when they say -- when they see four and then they
18 associate it with three, and what do they associate with three?
19 Everything that they already have stored in memory. And then
20 what happens is, what happens is this is what is principally in
21 psychology called activation spreading.

22 That means everything that they've seen about the
23 four-stripe is now getting associated with the three stripes
24 and that memory network. And over time, that memory network
25 smooshes together, and adidas isn't about adidas anymore. It's

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Joachimsthaler

1 kind of adidas to some people, it's a little bit of Thom
2 Browne. It's like smooshed together into one thing.

3 THE COURT: Well, we've already had considerable
4 expertise on the meaning of the word smoosh.

5 Anyway, why don't we continue.

6 THE WITNESS: OK.

7 BY MR. FLEMMING:

8 Q. Let's go to the next slide. Maybe it was the previous.
9 There we go.

10 You just mentioned activation spreading, so I don't
11 want you to repeat your testimony that you just gave. That was
12 very clear.

13 Can you briefly explain with this visual what
14 activation spreading means?

15 A. Yeah. Activation spreading is important because of the
16 network. Everything connects in some ways, and the first part
17 of this activation spreading to happen is that there needs to
18 be a link between four stripes and three stripes. And that's
19 what the Poret study basically showed, we just talked about.

20 But what that also means is that over time,
21 immediately and over time the adidas network is no longer
22 separate from the Thom Browne network. They move slowly
23 together. They come together. And that causes a problem for
24 adidas, because suddenly you can't -- you can't be inclusive
25 and then you're also exclusive. You can't be sportswear

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1 credibility and you're also design and luxury and something
2 else.

3 You know, it sort of becomes -- consumers realize,
4 well, I don't know anymore. Things don't really work together
5 for me. This is sort of -- this is causing a big problem.
6 Cognitively, that sort of causes a problem for adidas.

7 Q. Dr. Joachimsthaler, we've talked a lot about harm from a
8 consumer psychology perspective.

9 You also mentioned harm from a branding perspective.
10 Before we get into that, I want to ask if you're familiar with
11 Thom Browne's expert witness, Dr. Joel Steckel?

12 A. Yes, I am.

13 Q. Would you please compare his background to yours briefly?

14 A. Dr. Steckel is a professor --

15 MR. LEWIN: Objection.

16 THE COURT: Sustained.

17 Q. Then let's go ahead and talk about branding. We actually
18 can wrap up before lunch.

19 From a branding perspective, how --

20 THE COURT: That's if I can shut up.

21 Q. From a branding perspective, how is Thom Browne harming
22 adidas?

23 A. Well, from a branding perspective, as I mentioned just now,
24 it weakens the associations that adidas has. Sports,
25 inclusive, athleticism, authentic, all of these things.

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Joachimsthaler

1 Suddenly you're not that much there. What it means is that
2 consumers, when they think of one thing, suddenly they focus
3 and consumers get lost. So it weakens the associations because
4 these things sort of like move together into one thing, into
5 one thing in your head.

6 Q. So talking about weakening associations, what does that
7 mean practically?

8 What does that mean to the business?

9 How does that affect the bottom line?

10 A. Well, to the business, what that means is that consumers,
11 what it means is you need to spend a lot more advertising and
12 marketing to communicate what you are, what you stand for, that
13 you are actually an authentic sports brand, let's say. So it
14 means that your marketing investments really go up.

15 MR. LEWIN: Objection, your Honor.

16 THE COURT: Ground?

17 MR. LEWIN: I'm sorry. Relevance.

18 THE COURT: Well --

19 MR. LEWIN: And foundation.

20 I'm sorry, your Honor.

21 THE COURT: No, I think the foundation objection is
22 overruled. I think the relevance, it is irrelevant, but it's a
23 little marginal.

24 I think maybe, if we're going to fulfill your pledge
25 to finish his direct testimony by lunch, we should move on.

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Joachimsthaler

1 MR. FLEMMING: OK.

2 BY MR. FLEMMING:

3 Q. Dr. Joachimsthaler, you've talked about a couple of harms.

4 Can you identify the additional two concrete harms to
5 the adidas brand that Thom Browne is causing?

6 A. Basically another one harm is that it makes adidas less
7 distinctive, less differentiated from others. It's all over
8 the place. And when it's all over the place, then that affects
9 the sales of adidas products, that affects your liking, the
10 consumer's liking of the product, it affects the loyalty you
11 have to a product.

12 You say, is that still the brand that I really am used
13 to? No, they are in a different world now. So it sort of
14 causes a significant impact on the business side. It affects
15 sales.

16 MR. LEWIN: Objection, your Honor.

17 MR. FLEMMING: This goes to harm, your Honor.

18 THE COURT: Overruled.

19 Q. Dr. Joachimsthaler, we've talked about weakening brand
20 associations, you've talked about having to spend more to
21 reinforce those, and now you've just talked about how it
22 actually affects purchasing decisions.

23 Can you put a dollar amount on those harms that you
24 have just identified?

25 A. No. It is not as easy.

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Joachimsthaler

1 MR. LEWIN: Objection, this is --

2 THE COURT: Well, the answer is no, so we'll let that
3 stand as the answer.

4 He's not being called to put monetary valuations and
5 he is not purporting to do so, so put another question.

6 Q. Why can't you quantify it?

7 A. It's because these things happen, as the judge has said.
8 These things happen in consumers' minds.

9 MR. LEWIN: Objection, your Honor.

10 THE COURT: Sustained.

11 Q. Dr. Joachimsthaler, of the harms that you have identified,
12 how can they actually be prevented?

13 A. Well, there is only one way to do it, and that is to stop
14 selling Thom Browne products, the alleged products, I think,
15 with four stripes.

16 MR. FLEMMING: Pass the witness, your Honor.

17 THE COURT: OK. Ladies and gentlemen, two things.

18 First, when I ask questions of a witness, it's only to
19 try to clarify things. You should understand I have absolutely
20 no opinion as to how you should decide this case or how you
21 should view any given witness. That is entirely your job, not
22 mine. But second, since it's three minutes before one, I think
23 you deserve a three-minute extra lunch. We'll resume at two
24 o'clock. Have a good lunch.

25 (Continued on next page)

1 (Jury not present)

2 THE COURT: The witness mentioned Shari Diamond. I
3 take the liberty of mentioning that Dr. Diamond is one of the
4 true giants in the field of cognitive neuroscience and
5 psychology. I take very great liberty of mentioning to
6 counsel, for whatever purpose it might have a much, much, much
7 less important volume entitled The Judge's Guide to Cognitive
8 Neuroscience, coauthored by Mike Gazzaniga, one of the great
9 giants in the field, and Judge Jed Rakoff. Just to pass that
10 on.

11 I also can't help but mention that reference was made
12 to Gestalt psychology, which is certainly one of the most
13 important areas of psychology. And the great American
14 proponent of that was Dr. Solomon Asch, and his famous
15 experiments all dealt with variations on how people viewed
16 three lines.

17 I'm glad to say that adidas did not attack that
18 research as being an infringement of their mark. But if you
19 ever, just it's really interesting. He would draw three lines
20 on a blackboard, two of which were identical and one which was
21 clearly not identical. And then he would ask a group of seven,
22 eight people which of these three are identical.

23 The first five or six, all of whom were, you know,
24 stooges, so to speak, which say -- and they would say two and
25 three, which were the two that are totally different. And then

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Joachimsthaler

1 it got down to the person who was the actual subject. And in
2 an amazing percentage of cases, like 90 percent, they would
3 yield and say, Oh, I first thought it was one and two, but now
4 I see it's really two and three. So that was an interesting
5 study.

6 So, Doctor, we'll see you at two o'clock.

7 THE WITNESS: Thank you very much.

8 THE COURT: I'll need to know from defense counsel
9 before we start at two o'clock approximately how long you're
10 going to be on cross.

11 MR. LEWIN: Yes, your Honor. Thank you.

12 MR. FLEMMING: Your Honor, after Dr. Joachimsthaler,
13 another expert witness your Honor wanted to hear about before
14 he got on the stand in a response to a Daubert motion.

15 THE COURT: Oh, yes.

16 Are we going to be going to the midafternoon break
17 with your cross?

18 MR. LEWIN: Probably.

19 THE COURT: Yes.

20 All right. We'll do that at the midafternoon break.

21 THE DEFENDANT: Your Honor, are we breaking at four
22 today or 4:30?

23 THE COURT: I'm sorry. I think at one point I had a
24 matter at four, but I postponed it to 4:30 because I didn't
25 want to miss more of the trial.

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Joachimsthaller

1 MR. MALDONADO: Thank you, your Honor.
2 (Luncheon recess)

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N16Qadi5

Joachimsthaler - Cross

AFTERNOON SESSION

2:05 p.m.

CROSS-EXAMINATION

BY MR. LEWIN:

THE COURT: Please be seated.

(Jury present)

THE COURT: You may proceed.

MR. LEWIN: Thank you, your Honor.

Q. Dr. Joachimsthaler, you testified this morning that you have previously testified in a number of trademark cases, correct?

A. Correct.

Q. Have you ever had your -- withdrawn.

I assume that in connection with your testimony, you've rendered written reports of the findings that you had in that particular matter?

A. Yes.

Q. And have they always been accepted, sir?

A. Yes.

Q. Do you remember rendering a report in the matter of *Lucky Brand Dungarees v. Ally Apparel Get Lucky*?

A. Yes.

Q. And is it your testimony that your report was fully accepted in that matter?

A. My report was accepted, yes.

N16Qadi5

Joachimsthaler - Cross

1 Q. Let me be clear. Fully accepted, sir?

2 A. There was some initial research that I did, qualitative
3 research before the quantitative research, and the judge said I
4 should not rely on the initial qualitative I did. I was just
5 exploring the brand at the time without using it as part of my
6 testimony -- report.

7 Q. In that report, did not the court find that the probative
8 value of your opinion was minimal?

9 A. I don't know that. I hope that's not the case.

10 Q. You see the exhibit before you, sir?

11 A. Right, that's from 15 years ago.

12 Q. Right. And you recognize this, the title of the case?

13 A. Yes.

14 Q. Can we turn to page 2, the lower left side. Thank you. I
15 was just going to ask for that. You see where it says that
16 the --

17 MR. FLEMMING: Objection. 403.

18 THE COURT: Sustained.

19 MR. FLEMMING: And 402.

20 THE COURT: Sustained. Take it off.

21 MR. LEWIN: All right. Your Honor, if I may just
22 break for a second. When counsel objects, it would be
23 helpful -- he's facing you and in front of me, if I could ask
24 him to raise his voice. I can't hear the basis of the
25 objection.

N16Qadi5

Joachimsthaler - Cross

1 THE COURT: I agree.

2 MR. LEWIN: Thank you.

3 Q. Since we're not going to talk about the past, let's talk
4 about today. Your opinion, your report did not express any
5 opinion about trademark dilution, did it?

6 A. No.

7 Q. And your report did not express what fame was under
8 trademark law?

9 A. Yes, it did not.

10 Q. And do you find any link between -- do you have any
11 expertise between what would be considered harm to a brand and
12 trademark dilution?

13 MR. FLEMMING: Objection. Compound.

14 A. Again --

15 THE COURT: Hold on. There's an objection.

16 I think it's all right. You started with a different
17 question and then you came to a perfectly proper question. Why
18 don't you put it again in proper form.

19 Q. Do you have any expertise with regard to the link between
20 harm to a brand and trademark dilution?

21 A. Well, trademark dilution is a legal term. So I know how
22 harm occurs and as I explained earlier how brands get weakened,
23 and so that is my expertise.

24 Q. Now, you offered an opinion on adidas's market position in
25 the United States in your report, didn't you?

N16Qadi5

Joachimsthaler - Cross

1 A. Yes.

2 Q. And you considered it to be dominant in the sportswear
3 market. Is that correct?

4 A. Yes.

5 Q. And you've been paid today to testify for adidas, haven't
6 you?

7 A. Correct.

8 Q. And you are also a paid consultant with respect to other
9 work that you do for adidas, correct?

10 A. No.

11 Q. Do you render consulting services to adidas?

12 A. No.

13 Q. Have you ever?

14 A. Back in 1995 when adidas had some challenges globally, and
15 I worked on brands -- that's sort of 25 years ago, I helped to
16 clarify the differences between Nike and adidas, but that's a
17 long time ago.

18 Q. Fair enough. Since you brought it up though, Nike is
19 considerably larger than adidas, isn't it?

20 A. In the U.S. Nike is a whole market here. Adidas is a brand
21 from Europe. Yeah, it's considerably larger, about double the
22 size, I guess, globally at least.

23 Q. You made much during your morning testimony of exclusivity
24 versus inclusivity, correct?

25 A. Yeah, there is some -- that's correct, yes.

N16Qadi5

Joachimsthaller - Cross

1 Q. Thank you. And you indicate that adidas is apparently
2 damaged because it is an inclusive brand, and it is damaged
3 when it is associated in some manner with a non-inclusive
4 brand, correct?

5 A. I didn't understand correctly the point. I think you --
6 adidas is not damaged because it's an inclusive brand. Adidas
7 is -- the belief system of adidas, the values of the company
8 and of the brand is about being inclusive.

9 Q. And you indicated that you would call Nike an exclusive
10 brand or a brand -- withdrawn -- an exclusive brand?

11 A. Nike, I wrote about a book in 2000 and I compared Nike and
12 adidas back then, and the notion is that Nike is much more an
13 exclusive brand. You got to be an athlete. It's about
14 winning. It's about an aspiration of athleticism.

15 Q. I take that to mean, sir, that Nike is not interested in
16 selling product to the same athletes that adidas is interested
17 in selling to?

18 MR. FLEMMING: Objection. Relevance.

19 THE COURT: Well, the objection on relevance is
20 overruled. If the objection was on grounds of speculation,
21 foundation, conceivably hearsay, I might have had to sustain
22 the objection. But since it's on the ground of relevance, it's
23 overruled, so you may answer the question.

24 A. Both companies follow what's called a hierarchy of
25 influence model. You market to serious athletes then to

N16Qadi5

Joachimsthaler - Cross

1 weekend warriors, but you're also selling to a very large mass
2 market. So Nike, like adidas, wants to sell to serious
3 athletes as much as to based on the sportswear ability and Nike
4 does it too, but they definitely sell to the -- to everybody.
5 But the belief system, as I said, the belief system of Nike is,
6 you know, if you run with Nike, you're an athlete. It's a
7 value system.

8 Q. I'm sorry, I don't mean to interrupt. If you weren't done,
9 please finish.

10 And how do you know that Nike's value system is
11 exclusive?

12 A. As I said, as early as the year 2000, I have researched
13 Nike for my book back then, and I've researched them over the
14 last 20 years. So I did not say that they are exclusive. I
15 say they have a value system of being more exclusive relative
16 to adidas. Adidas has a value system of being inclusive.

17 Q. You conducted, I believe your personal survey in this
18 matter, and you consider what is called a recognition survey.
19 Is that correct?

20 A. I don't think I called it that way, but I did a survey in
21 this case, specifically for this case, yes.

22 Q. And do you recall that you called it original empirical
23 research?

24 A. Yes, that's what I called it. That's how we call it in the
25 scientific world, in the academic world.

N16Qadi5

Joachimsthaller - Cross

1 Q. And you don't recall or you're saying that -- withdrawn.

2 You don't recall indicating that in your view it was a
3 recognition survey?

4 A. The kind of question that I used is actually a recognition.
5 It's actually a recall survey, not a recognition survey. So
6 technically it's a different survey.

7 Q. Would you put up tab A, please.

8 MR. LEWIN: Your Honor, this is impeachment in
9 transcript. Page 31:7-15.

10 MR. FLEMMING: Objection. Collateral.

11 THE COURT: Overruled.

12 MR. LEWIN: Can we publish that to the jury, please.

13 Q. Now, sir, I represent to you that this is a portion of a
14 transcript of a deposition that you gave in this matter. And
15 you see where it says: "How would you describe the surveys in
16 this case?"

17 Would you agree with me your answer was:

18 "A. Original empirical research?"

19 A. Yes.

20 Q. And then question was: "I believe you referred to it as a
21 recognition study."

22 Your answer was: "So I would say that's a recognition
23 study, an originally owned empirical research survey."

24 Is that correct, sir?

25 A. Yes, that goes to the earlier testimony on aided versus

N16Qadi5

Joachimsthaler - Cross

1 unaided. Typically in our world --

2 Q. Sir, I don't mean to cut you off. I apologize.

3 A. But you did.

4 THE COURT: Yes, but he cut you off because he didn't
5 ask you for an explanation. He just asked you whether you said
6 what you said in the deposition. So you can't volunteer, and
7 so he had every right to cut you off.

8 THE WITNESS: All right. Thank you.

9 A. Thank you.

10 Q. The recognition study did not test for fame, did it?

11 A. No, it did not test for fame.

12 Q. Now, for the study that you're relying on, your own study,
13 the empirical study, recognition study, if you'll agree with me
14 for the moment, how did you determine what the population was
15 of the several thousand respondents?

16 A. I don't know the details any more but we randomly select
17 over 2,000 from a panel of consumers, and we provided a frame
18 of reference, meaning we said we would like to talk to
19 consumers who are sports wearing -- purchasing in the sports
20 category.

21 Q. So that would be a survey that was not inclusive of the
22 general population?

23 A. Yeah. If it would be general, then it would be a fame
24 survey. I did not do a fame survey.

25 Q. A very selective one, actually, correct?

N16Qadi5

Joachimsthaler - Cross

1 A. Yeah, within that. Yes.

2 Q. And I believe you also indicated that you relied on a
3 survey which was conducted by Mr. Hal Poret, correct?

4 A. Correct.

5 Q. And could you remind us why you included your review of
6 Mr. Poret?

7 A. Why I --

8 Q. Why you relied on it, how about that?

9 A. I relied on Mr. Poret because the survey shows the
10 infringing product from, if I remember the details now --
11 excuse me -- accused products from Thom Browne, and I relied on
12 it, I wanted to know to what extent consumers invoke adidas,
13 adidas's three stripes.

14 Q. Did you rely on any other studies to indicate to you some
15 measure of consumer response to the adidas stripes?

16 A. Yes. There is, as I said earlier, a lot of surveys being
17 conducted that shows the three stripes and how it relates to --

18 Q. Sir, I just wanted to know if you could tell us a
19 particular survey that you relied on?

20 A. Earlier in testimony I said there are more than two
21 handfuls, so I don't know that -- and adidas conducts them
22 every three months, so sorry.

23 Q. And the surveys you're talking about are conducted by
24 adidas, correct?

25 A. No, they are conducted by third party, third-party

N16Qadi5

Joachimsthaler - Cross

1 providers, yes.

2 Q. You indicated at one point that you relied on or you
3 incorporated in your opinion a survey from 2005. Do you
4 remember that?

5 A. Yes.

6 Q. Now that survey was commissioned by adidas, was it not?

7 A. Yes.

8 Q. In your survey, did you rely on the same methodology that
9 adidas did to conduct its surveys?

10 A. What do you mean by the same?

11 Q. Did you hire an outside survey company to conduct this?

12 A. Well, I hired an outside, a very large survey company to
13 conduct the study, but I analyzed them myself.

14 Q. Thank you. And you indicated that that study was between
15 consumers 18 and 64 years of age?

16 A. Yes.

17 Q. Correct? And they had to wear sportswear or buy these
18 items for their household, correct?

19 A. Yes.

20 Q. And what was the definition of sportswear that you would
21 apply to that use?

22 A. I would have to look back at the questionnaire, but I asked
23 the consumers, for me I ask consumers -- I ask consumers
24 whether they qualify, whether they wear or are using certain
25 sportswear. I don't know the specific question.

N16Qadi5

Joachimsthaller - Cross

1 Q. I'm sorry, I didn't make myself clear. Let me see if I can
2 do better. You used the term sportswear in your survey.

3 A. Mmm-hmm.

4 Q. What does sportswear mean to you?

5 A. You know, I know sportswear from several dimensions. One
6 dimension is how I use it in the world of business. In my
7 report I talked about how large sportswear is. And when I --

8 Q. Sir, again, I'm sorry, but I am trying to get to a category
9 of --

10 MR. FLEMMING: Objection, your Honor.

11 THE COURT: No, I think the answer was not really
12 responsive. What he wants to know is when you use the term
13 sportswear, what articles are you including in that?

14 A. Well, it depends on how I -- whether I use a business
15 definition or I use a definition from a brand point of view. I
16 need to do both in my work.

17 THE COURT: Did you do both here?

18 THE WITNESS: Yes.

19 THE COURT: So what's the difference?

20 THE WITNESS: So the difference is, as I just said, is
21 that the business definition it's at the beginning of my report
22 where I talk about sportswear and the category of sportswear.
23 That definition is an industry definition.

24 THE COURT: But what is it?

25 THE WITNESS: And it defines sportswear as companies

N16Qadi5

Joachimsthaler - Cross

1 that are defined to be operating within the sportswear
2 classifications. And there is a \$250 billion number that says
3 this is companies that operate in sportswear. That's the
4 business definition.

5 The second definition that I use in my work and that
6 we use as brand experts is we look at what consumers perceive
7 as sportswear.

8 Q. Can we have tab C, please. Go to paragraph 123.

9 If you look at the first several lines, if I may,
10 beginning with empirical study. You see that very first full
11 sentence. Does that refresh your recollection as to what you
12 intended sportswear to mean?

13 A. Yes.

14 Q. In the context of this survey?

15 A. Yes.

16 Q. All right. What does sportswear mean in the context of
17 this survey?

18 A. Again, I would have to look at the specific question that I
19 asked. It's in part of my report in my survey where I ask
20 consumers to respond with respect to sportswear. I can't
21 really know the specific question.

22 Q. Would it be fair to say, sir, that you indicated that
23 sportswear was an item, was items?

24 A. Items, that's possible. Yeah, products.

25 Q. Did you further define those items in any study that you

N16Qadi5

Joachimsthaller - Cross

1 did related to this case?

2 A. I did this in my report, yes. I did an entire industry
3 analysis, and, as I said earlier, I looked at the business
4 definition as it is used by Nike, by adidas and everybody else,
5 and I also defined it from the consumer perspective.

6 Q. Did you tell the consumers that when you were conducting
7 the survey itself?

8 A. Again, I don't know any more of the specific question. I
9 would have to look at the questionnaire. I don't know it right
10 now, unfortunately.

11 Q. Now, in the surveys that you offered to support your
12 opinion and that you reviewed, a number of those were conducted
13 or commissioned by adidas, correct?

14 A. That's correct.

15 Q. And can you indicate any of the surveys that you relied on
16 that compared adidas to brands other than strong sportswear
17 brands?

18 A. There are studies where adidas compares themselves to the
19 best of the best from a brand perspective. I have seen these
20 studies before, and yes, there are studies like that.

21 Q. Did you rely on those studies in formulating your report?

22 A. Yes.

23 Q. So that helped you select the brands that you highlighted
24 in your report in comparison to adidas?

25 A. No, in my report, I have used sportswear brands. So I

N16Qadi5

Joachimsthaler - Cross

1 didn't have to rely on reports that goes beyond sportswear.

2 You asked about beyond sportswear.

3 Q. You indicated that I guess in the first stage there were
4 three stages of consumer processing information that leads to
5 the -- and forgive me, I am not technically adept; way too old
6 to learn -- but that the consumer somehow or other gives rise
7 to the memory and he assigns attributes to that trademark when
8 he sees that trademark or that logo. Is that correct?

9 MR. FLEMMING: Objection. Compound.

10 THE COURT: Yes. You can rephrase it. Break it down.

11 Q. Would you agree that you used in your report a description
12 as an example consumer recognizing in the first stage that he
13 needs a pair of sweatpants for both gym and office?

14 A. I didn't get the full question.

15 Q. I'm sorry. Would you agree with me that you used as an
16 example of the first stage of this processing where a consumer
17 recognizes he has a certain need for something, and you offered
18 as an example where he wants sweatpants for both the gym and
19 office?

20 A. Yeah. I don't know exactly any more that one specific
21 sentence but what you refer to is that consumers have a
22 problem. They perceive a problem. That's sort of the
23 beginning of what we call the consumer journey, the process of
24 a consumer to decide. And I may have used that example. I
25 don't remember very well, but you could -- yeah, in this day

N16Qadi5

Joachimsthaler - Cross

1 and age you can say a consumer uses -- says I have a problem, I
2 need to go and you decide whether to use sweatpants or not to
3 go to the office. That exists today.

4 Q. Assuming that happens, the second stage is where the
5 consumer narrows down and evaluates a number of brands that
6 come to his mind from the various drawers presumably in his
7 brain, correct?

8 A. Yes.

9 Q. And he associates those with the attributes of that, what
10 he needs. He associates those brands with the attributes that
11 his need reflects, correct?

12 A. Yes.

13 Q. And you indicated that Nike, Under Armour, adidas, and I
14 think Lululemon were typical of those brands that would come to
15 mind in that process?

16 A. Well, that's just illustrative. It could be anything that
17 comes to mind. For some, that's just in the category of some
18 category that they -- they all offer products that is sometimes
19 wearable for office and sometimes not.

20 Q. But you did say, sir, did you not that adidas, Nike and
21 Under Armour are in, to use your words, the same category of
22 interest, correct?

23 A. Adidas, Nike and Under Armour are in the same category of
24 interest. It's possible that I said that. It kind of makes
25 sense. They are part of sportswear.

N16Qadi5

Joachimsthaler - Cross

1 Q. And those are the brands that you consider comparable to
2 adidas, correct?

3 A. Yes.

4 Q. Can I have PX-285, page 4.

5 MR. LEWIN: This has been admitted already, your
6 Honor.

7 THE COURT: Yes.

8 MR. LEWIN: Can we publish that to the jury?

9 Q. Sir, I'd like to learn a little bit more about what you did
10 with respect to this survey. This survey was conducted via the
11 internet, correct?

12 A. Yes.

13 Q. And you sought to avoid issues by rotating randomly the
14 images that were shown to the consumers, correct?

15 A. Yes.

16 Q. Did you ever show those consumers all four of these
17 together?

18 A. They are shown side by side.

19 Q. And if you'll agree with me, the second one is Nike?

20 A. Yes.

21 Q. Third one is Puma?

22 A. Yep.

23 Q. Fourth one is Under Armour. Correct?

24 A. Yes.

25 Q. And those are all leading at athletic brands, correct?

N16Qadi5

Joachimsthaller - Cross

1 A. Yep.

2 Q. And the one that you were testing, the product that you
3 were testing on behalf of adidas was in the upper left, a
4 three-stripe, plain white, long-sleeve shirt of some kind?

5 A. Yes, in this image.

6 Q. Correct. And those three stripes are vertical, correct?

7 A. Yes.

8 Q. And the consumer was asked what brand, if any, correct?
9 And they were told it was okay not to have a brand, right?

10 A. Yep. What brand do you think -- it says what brand do you
11 think, yes.

12 Q. Makes this long-sleeve shirt, right? And it was all four
13 of those at the same time then, correct?

14 A. Yes.

15 Q. Is there a particular reason in this particular instance
16 that you selected Nike, Puma, and Under Armour as logos?

17 A. The reason that I chose Nike as an example because the key
18 visual of identifier of Nike is the swoosh. It's actually
19 famous. And I did the same thing, same thing with Under
20 Armour. Typically, in those cases, the logo is the key visual
21 identifier.

22 Q. Well, you would agree with me, would you not, that when the
23 respondents see Nike, Under Armour and the Puma logo, they are
24 more likely than not to conceive of adidas in what you call a
25 consideration set, correct?

N16Qadi5

Joachimsthaler - Cross

1 A. I didn't understand that question.

2 Q. Well, sir, very simple. When you see Nike, Under Armour
3 and Puma and then are asked what brand some other item is, you
4 have the concept of a consideration set in your report, do you
5 not?

6 A. I do have the consideration set in my report? What does
7 that mean?

8 Q. What do you mean by a consideration set?

9 A. Consideration set is a consumer in order to evaluate a
10 brand or several brands chooses a subset, which is called a
11 consideration set, and usually uses those three or four
12 brands -- sometimes it's two, sometimes it's six -- to assess
13 which one they will consider for further evaluation in their
14 purchase.

15 Q. What I'm suggesting to you, sir, is by using those -- Nike,
16 Puma and Under Armour -- that in that consideration set, adidas
17 would come up next.

18 A. I don't understand the question. What does it mean next?

19 Q. I will move on, sir.

20 You only tested consumers that knew sportswear brands,
21 correct?

22 A. Yes.

23 Q. You didn't test consumers that knew luxury brands or other
24 brands like Gucci or Prada?

25 A. I looked at sportswear brands.

N16Qadi5

Joachimsthaler - Cross

1 Q. You didn't test horizontal stripes, did you?

2 A. No, these were the images I tested.

3 Q. And that image that we're talking about is the white shirt
4 with the vertical stripes running down both sides, both
5 sleeves, correct?

6 A. That's right, that's the stimuli.

7 Q. And why that particular stimulation?

8 A. You know, I thought -- I wanted to use a neutral apparel,
9 something that consumers associate with, like a T-shirt.

10 Q. I'm sorry, sir. Let me be clearer. I don't want to have
11 you waste your time or the Court's. You selected three
12 vertical stripes on both sides of the garment --

13 A. Yes.

14 Q. -- to illustrate your -- to achieve your goal of finding
15 out. Why those stripes in that configuration?

16 A. Those are the stripes associated with adidas.

17 Q. Thank you.

18 Have you tested any other stripe configurations to
19 determine whether they are associated with adidas?

20 A. No.

21 Q. With respect to the 2005 survey that we talked about, I
22 think the objective, if you recall it -- and if not, I'll pull
23 it up for you -- was to track the brand health of adidas over
24 time with the help of KPIs?

25 A. Yes.

N16Qadi5

Joachimsthaler - Cross

1 Q. I thought that might bring about a smile. Can you explain
2 what a KPI is?

3 A. I smiled because I assumed the jury goes like, "What the
4 heck?"

5 Q. Not only the jury, sir.

6 A. KPI is a -- it's called key performance indicator. And
7 that's what a KPI is.

8 Q. Thank you. You also used this study or relied on this
9 study to generate insights and answers on relevant brand
10 specific questions, didn't you?

11 A. Yes. I did not conduct that study, but yes.

12 Q. The study looked at adidas, Nike, Puma, Reebok, and New
13 Balance, correct?

14 A. Mmm-hmm, that's possible.

15 Q. And who selected the brands as the brands to be in this
16 study?

17 A. I don't remember. I was not involved in conducting that
18 study.

19 Q. So you didn't select the brands?

20 A. No, I did not.

21 Q. Do you recall that the respondents in that study were 14 to
22 30?

23 A. Yes. I don't recall it, but I believe that's the case.
24 It's not unusual that you study that age group.

25 Q. Well, perhaps I can go a bit further with that. And if

N16Qadi5

Joachimsthaller - Cross

1 not, I'm happy to show you the document. But do you recall,
2 sir, that the sample was 50 percent male, 50 percent female?

3 A. I don't recall, but I would trust that that's correct; it's
4 2005.

5 Q. And it was divided equally, one-third, one-third, one-third
6 between a range 14 to 17. Another range 18 to 24. And a third
7 range 25 to 30. Do you recall that?

8 A. Yes.

9 Q. And one hundred percent of the respondents in order to
10 qualify for the test had to wear sports shoes or sports
11 clothing for sport that they're either doing themselves or in
12 their free time?

13 A. Mmm-hmm.

14 Q. And one hundred percent have bought sport shoes in the last
15 six months, correct?

16 A. Yeah.

17 Q. This is considerably different, is it not, than the general
18 population?

19 A. Definitely. It's not a fame survey.

20 Q. Thank you.

21 Let's look at -- withdrawn. You also relied, I think
22 in your report, on a 2023 study?

23 A. Yeah.

24 Q. Which actually was conducted apparently in 2021. Do you
25 recall who conducted that study?

N16Qadi5

Joachimsthaller - Cross

1 A. No, the words are different. Now Kantar is one of the
2 companies, large companies, that I think is doing that study,
3 yes.

4 Q. And let's look at PX-45, if we could.

5 MR. LEWIN: Your Honor, this was actually, I believe,
6 referred to and admitted this morning.

7 THE COURT: Okay.

8 MR. LEWIN: Can we publish to the jury?

9 THE COURT: Yes.

10 Q. You discussed this during your direct examination, did you
11 not?

12 A. Yes.

13 Q. This is one of the studies you relied on, correct?

14 A. Correct.

15 Q. And you talked about aided and unaided, did you not?

16 A. Yes.

17 Q. And there was an opinion rendered in that report 57 percent
18 of the people were aware of adidas unaided, correct?

19 A. Yes. I don't know exactly.

20 Q. Well, if we can turn to page 23 of this report. If you
21 need a moment to refresh your recollection, sir, please take
22 it, but I want -- if you don't, I can move on quickly.

23 A. Yes.

24 Q. Thank you. You see where that red one is on the upper
25 left?

N16Qadi5

Joachimsthaler - Cross

1 A. Yes, mmm-hmm.

2 Q. And it says awareness unaided, correct?

3 A. Yes.

4 Q. Is it true here that in this case what was being measured
5 was not the stripes alone, but what would be called the
6 mountain logo or any one of a variety of names, but consists of
7 the three lines with the word adidas under it?

8 A. That is -- yes.

9 Q. Right?

10 A. Yep.

11 Q. Underneath that is the swoosh with nothing under it,
12 correct?

13 A. Yes.

14 Q. But they weren't testing stripes here, were they?

15 A. Well, they tested stripes. In some ways, stripes are
16 reflected in this particular logo called, the BOS, Badge of
17 Sports.

18 Q. And that logo says adidas under it, doesn't it?

19 A. Yes. Just like with Converse, it says Converse.

20 Q. Yes, sir. And the Reebok says Reebok?

21 A. Mmm-hmm.

22 Q. So you understand that the Badge of Sports, which is what
23 this is called in some terminology, is not being asserted in
24 this case, right?

25 A. That is correct.

N16Qadi5

Joachimsthaler - Cross

1 Q. Do you know whether any configurations of the purported
2 Three-Stripe Mark were tested separately from this particular
3 survey?

4 A. I don't know. Adidas has done some studies on the strength
5 of the brand, and I don't know specifically, but it's always
6 been a very important thing, three stripes, and it's sort of a
7 key piece of the brand obviously. And so I don't know -- I
8 don't know whether -- I haven't conducted any study or I don't
9 know right now as I sit here, but it seems like something that
10 is done typically, so I might be -- typically in our business,
11 we do this kind of --

12 Q. Sir, if I can move on. Thank you. Do you know what the
13 demographics of the respondents were in this study?

14 A. In this study here?

15 Q. You do?

16 A. Yes. It says on the top left here 14 to 64 year olds.

17 Q. And you also know the only thing tested in this study was
18 the Badge of Sport, correct?

19 A. That's how in this report it is identified. I don't know
20 the underlying questionnaire. So to the extent this is what
21 the questionnaire reflects, then the answer is yes.

22 Q. Now, you understand the expression "coming to mind" when
23 doing work in this area?

24 A. Yes.

25 Q. What does that mean?

N16Qadi5

Joachimsthaler - Cross

1 A. Coming to mind is you want -- along this journey process
2 here, awareness, consideration, the black chart, you want the
3 brand to come to mind, to consumers mind as easily as possible,
4 that's the goal.

5 Q. And would you agree with me that the results of this survey
6 indicate there was a huge gap between Nike and adidas in terms
7 of coming to mind?

8 A. They are both very high because this is unaided. Unaided.
9 It's very, very different.

10 Q. Sir, I'm sorry. Let me call your attention to that same
11 page on the right side, number one right there. This is a
12 correct statement, isn't it? You would agree with this
13 statement?

14 A. Yeah. Nike is the American brand here. Nike is --

15 Q. Sir, I'm asking only if you agree with the statement.

16 A. Yes, definitely.

17 Q. You testified earlier today that the Three-Stripe Mark was
18 strong in the minds of consumers and related strongly to
19 adidas, correct?

20 A. Yes.

21 Q. And in your statement, sir, you did not have the
22 opportunity to qualify is the question I'm asking. Did you
23 include in that statement any results relating to the trefoil
24 or the Badge of Sport?

25 A. No.

N16Qadi5

Joachimsthaller - Cross

1 Q. So your conclusion is strictly separate and apart from any
2 of that use, correct?

3 A. My conclusion and my survey is about the three stripes on
4 the sleeve, that's what I tested.

5 Q. Fair enough. So in making that conclusion, you relied on
6 your survey?

7 A. Yeah.

8 Q. And did you rely on any other survey conducted by adidas
9 internally that you reviewed?

10 A. Remember, we looked at, reviewed several studies where
11 people were asked how they relate to three stripes, and they
12 said they would invoke adidas. Yeah, they're surveys, but
13 they're not specifically designed as I have done it.

14 Q. Well, wasn't it your testimony, sir, that when consumers
15 hear the phrase Three-Stripe Mark, they think of the trefoil or
16 the Badge of Sports logo?

17 A. I did not -- I didn't test the hearing part when they hear
18 it. So I actually presented in my survey, I presented them a
19 visual stimuli.

20 Q. Well, if we could turn to tab A again of the doctor's
21 transcript in deposition and publish it only to the Court,
22 witness and counsel. I would call the Court's attention to
23 page 172, lines 19 through 24.

24 MR. FLEMMING: Objection, your Honor. A partial
25 answer.

N16Qadi5

Joachimsthaller - Cross

1 THE COURT: Can I see the rest? Go back to the
2 previous question.

3 I don't think it bears on the previous answer.
4 Sustained.

5 MR. LEWIN: Thank you, your Honor.

6 Q. Would you categorize, sir, from your expert, position or
7 expertise, adidas and Thom Browne as competitors?

8 A. From the consumers' point of view, which is my sort of
9 point of view, they compete, yes.

10 Q. And they compete for wallet share? Wouldn't that be fair
11 to say?

12 A. For?

13 Q. What we would call wallet share? If you don't understand
14 that term, I'll be happy to clarify it.

15 A. Yes, wallet share would be good. I would accept that too.

16 Q. Thank you. And you --

17 THE COURT: I'm not sure the jury --

18 Q. I'm happy to explain that. Let's ask the witness. What do
19 you understand the term wallet share to mean?

20 A. Well, wallet share is, I can decide -- if I'm a consumer, I
21 can decide I buy an adidas shoe or apparel, a sweater. Or I
22 say, hey, I got some extra money, I'm going to buy something
23 from Thom Browne. So Thom Browne competes because I have a
24 limited budget. I have a salary, a monthly income that I get,
25 and I need to choose if I buy something to wear, let's say,

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Joachimsthaler - Cross

1 like something sweat pants, let's say, I need to choose between
2 one or the other, but I don't buy both. I don't need both. So
3 in a way adidas competes with Nike -- sorry -- Thom Browne and
4 Thom Browne competes for my wallet, the share of my wallet.

5 Q. And that would be true under your definition if I had to
6 make a choice between buying a sweatshirt and eating dinner,
7 wouldn't it?

8 A. That also competes, at least in my budget.

9 Q. You understand the term athleisure, sir?

10 A. Yes.

11 Q. How do you define athleisure?

12 A. Athleisure is a new category growing very much now. I
13 defined it specifically in my report. Athleisure is sort of
14 sportswear that can be used for everyday wear, even for the
15 office.

16 Q. In your view, Lululemon, Vans and Athletica are the brands
17 that compete with adidas in the athleisure category, correct?

18 A. Yes, Lululemon is one the brands in that category.

19 Q. Do you know happen to know what the adidas market share is
20 in athleisure?

21 A. No, I don't know it right now.

22 Q. Do you happen to know what Thom Browne's market share is in
23 athleisure?

24 A. No, I don't know.

25 Q. Sir, would you agree with me that in terms of determining

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Joachimsthaler - Cross

1 competition under your market wallet -- wallet share statement
2 that price becomes a factor in the decision-making process?

3 MR. FLEMMING: Objection. Outside the scope.

4 THE COURT: Overruled. You may answer.

5 A. Given the explanation that I gave earlier on the share of
6 wallet, price makes a difference, yes.

7 Q. Thank you. And you would agree that Prada, for example, a
8 luxury brand like Prada is not a direct competitor with an
9 athleisure company, correct?

10 A. Well, it is by my definition. I can choose a luxury item
11 to purchase or I can choose a more broader, sort of more
12 available inclusive-type brand like adidas.

13 Q. Have you ever read a study, sir, that places Thom Browne
14 and adidas as competitors?

15 A. No, I wouldn't expect that.

16 Q. You ever see any documents in your reviewing of all of the
17 adidas documents where adidas describes Thom Browne as a
18 competitor?

19 A. No. No, I don't think so.

20 Q. Sir, I'm reluctant to get into this, but I will. During
21 your examination today, you discussed the concept of memory
22 networks activation spreading. Am I correct?

23 A. No, it's called activation spreading. Spreading like
24 diffusing.

25 Q. Yeah.

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Joachimsthaler - Cross

1 A. Spreading.

2 Q. But you're relating that statement to memory net -- what
3 you call memory networks, correct?

4 A. Yeah. I'm not calling it that way. That's a standard in
5 our field in cognitive science.

6 Q. I would like to call up demonstrative number 1, page 19
7 please, your demonstrative.

8 You recall seeing this earlier today, correct?

9 A. I didn't hear the question.

10 Q. You recall seeing this earlier today?

11 A. Yes.

12 Q. Okay. And the red lines that are dotted to three stripes
13 on the adidas side are connected to the Grosgrain ribbon on the
14 Thom Browne side?

15 A. Yes.

16 Q. Why?

17 A. Because the empirical evidence -- and I think it was
18 referred to as the Poret study -- showed that when they see the
19 four stripes that is also linked, the four stripes within the
20 network of Thom Browne is also linked to Grosgrain ribbon.
21 When they see that, that invokes the three -- three stripes.
22 There is empirical evidence.

23 Q. You relied on the Poret survey then to make that dotted red
24 line, correct?

25 A. That's correct.

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Joachimsthaller - Cross

1 Q. And is that the same one you made the dotted red line
2 between four stripes and three stripes?

3 A. Yes.

4 Q. And was that the same when you made the dotted line between
5 exclusive and inclusive?

6 A. No, that's not in the -- that's not in the Poret study.

7 Q. So is there some study that you base this upon?

8 A. So, in testimony this morning or this afternoon, I
9 illustrated that the way a brand is harmed is first -- and this
10 is why we are here -- is first consumers make a connection from
11 the four stripes of Thom Browne and invoke the three stripes.
12 And once that connection is made, activation spreading, and
13 that's why I wanted to explain the psychological principle.
14 Activation spreading takes place because there is that linkage.
15 And, as I said, in testimony that activation spreading takes
16 place not only consciously but also unconsciously. So we
17 called the word smushing, smushing together. The red lines
18 here are illustrative of my testimony earlier where I said
19 there is a dissonance, a difference between the Thom Browne
20 exclusive brand perception and the inclusivity brand
21 perceptions of adidas, and that's why I illustrated is the way
22 harm takes place.

23 Q. Very good. You have the connection here between Grosgrain
24 ribbon and three stripes, correct?

25 A. Yes.

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Joachimsthaler - Cross

1 Q. In this activation spreading process, at least.

2 And you relied on the Poret study to do that, correct?

3 A. So Poret does not assess the activation spreading. Poret
4 only assesses whether the activation spreading, the foundation
5 of activation spreading, when four stripes or Grosgrain ribbon
6 or four stripes Thom Browne invokes the three stripes, which is
7 Poret's study established, then activation spreading takes
8 place. It's not in the study itself, the activation spreading.
9 It's a psychological principle that's proven empirically over
10 and over again.

11 Q. Thank you, sir.

12 Just to explain a little bit more to me , you have a
13 connection between fashion on the Thom Browne side and sport
14 credibility on the other side?

15 A. Yes.

16 Q. And apparently you're saying that, if I understand this
17 right -- and forgive me again, I make no representation I'm an
18 expert in this. But if I understand you right, an attribute
19 first of fashion is attributable to Thom Browne himself, and
20 then it somehow or other spreads to infect adidas's
21 relationship with sport credibility. Is that correct?

22 A. Yes.

23 Q. If I understand you correctly, that's a -- the concept of
24 sport credibility is tied to the Three-Stripe Mark?

25 A. That's correct.

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Joachimsthaller - Cross

1 Q. And that the fashion of Thom Browne somehow or other
2 diminishes the brain's association with sport credibility and
3 adidas. Is that correct?

4 A. Yes.

5 Q. Thank you. And you have basically the same lines, I guess,
6 for theatrical fashion shows?

7 A. Yeah.

8 Q. Thom Browne's use of theatrical fashion shows affect the
9 sport credibility of adidas. Is that correct?

10 A. Yes.

11 Q. And, well, we'll take one. Let's try the theatrical
12 fashion shows. How does that relate to sport credibility?

13 A. So, if you remember my definition on sport credibility,
14 it's about being authentic to a history. You create a shoe or
15 an apparel that helps in athletes to perform better.

16 Performance, technology, quality, particular fabric, particular
17 type of fabric, particular type of material, particular type of
18 shoe, and you establish that sport credibility through
19 sponsoring athletes, Messi if you know soccer. You establish
20 it through putting it on products they wear, sports apparel
21 they wear, you sponsor --

22 Q. Sir, with respect, my question was how does theatrical
23 fashion show impact sports credibility?

24 A. So to continue my answer, theatrical fashion shows
25 typically are about expressing the design of Thom Browne,

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Joachimsthaler - Cross

1 expressing the artistic and luxury position of Thom Browne.
2 And these particular fashion shows aren't usual fashion shows.
3 They're actually known and written up in the trade magazines as
4 theatric. There is theater to that. Theater is about art,
5 design, celebrity, about luxury, and that is fine. That's good
6 for Thom Browne, and this is the right thing to do for Thom
7 Browne. But that theatrical fashion show is in contrast to be
8 more serving athletes and also anybody who wants to be part of
9 the adidas community, and it sort of contrasts and even in some
10 ways conflicting with sports credibility.

11 Q. Sir, I know I'm cutting you off, but maybe I could try to
12 rephrase this question. You see that there's a connection
13 between theatrical fashion shows and sport credibility,
14 correct?

15 A. Yes.

16 Q. And there's a second connection between sport credibility
17 and three stripes?

18 A. Yes.

19 (Continued on next page)
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N16sADI6

Joachimsthaler - Cross

1 BY MR. LEWIN:

2 Q. Right.

3 So this is, I'm too old to say, Tinkers to Evans to
4 Chance, but this is it a multi-step process in the brain, is it
5 not?

6 A. It all happens at the same time, you know.

7 Q. OK. If a theatrical -- if a fashion show is highly
8 theatrical, does that relate to sports in some way that harms
9 adidas?

10 A. It depends on the theatrical fashion show.

11 Q. Thank you.

12 MR. LEWIN: I know we're probably coming down to the
13 break. I'll ask one last question and be finished on this
14 segment.

15 THE COURT: No, no.

16 MR. LEWIN: All right. Thank you, your Honor.

17 THE COURT: You can go ahead for another ten minutes.

18 MR. LEWIN: OK. Great.

19 BY MR. LEWIN:

20 Q. Now, you have the little circle with the word luxury in it,
21 right?

22 A. Yes.

23 Q. And you show no direct association between Thom Browne and
24 luxury, is that correct?

25 A. Yes.

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Joachimsthaler - Cross

1 Q. You show a relationship between luxury and American or
2 being American and then to Thom Browne, correct?

3 A. Yes.

4 Q. And you show a relationship to the trademark, the Grosgrain
5 ribbon trademark, and then to Thom Browne, correct?

6 A. Yes.

7 Q. And you don't show the word luxury on the adidas side?

8 A. Yes.

9 Q. Why not?

10 A. Um, the core of adidas is not about luxury. I think that's
11 why.

12 Q. Thank you.

13 Adidas is not a luxury brand, is it, in your view?

14 A. No.

15 Q. And are you aware of the collaboration between adidas and
16 Y-3?

17 A. No.

18 Q. OK. And would you agree with us today, with me today, that
19 as of today, adidas is not a luxury brand?

20 A. Um, so adidas has --

21 Do you call it Y-3? I think it's Yamamoto.

22 Q. Yes, that's the brand of Yamamoto.

23 A. So adidas has a collaboration with Yamamoto which is a
24 luxury brand.

25 Q. So does that make -- in your view, does that make adidas a

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Joachimsthaler - Cross

1 luxury brand?

2 A. No.

3 Q. OK. Now I notice that you don't have any celebrity circle
4 up relating to Thom Browne?

5 A. Yes.

6 Q. Is it your position that Thom Browne and celebrities are
7 not associated with each other?

8 A. Um, no, I don't think so. I think that they are
9 associated, but a lot of celebrities would wear Thom Browne,
10 but I don't -- I could not in my research identify any
11 celebrity -- like Beyonce for adidas, let's say -- that would
12 sort of be, like, closely connected from a consumer's point of
13 view with Thom Browne.

14 Q. Celebrities that adidas is associated with that you're
15 identifying are sports athletes, are they not?

16 A. No, not always.

17 Q. Can you give me an example of one that is not?

18 A. Beyonce. She's a singer.

19 Q. All right. And are you aware that Thom Browne has
20 collaboration agreements with celebrities?

21 A. No. I don't know very much about their collaborations.

22 Q. All right. Now, your opinion is that -- let me just --

23 MR. LEWIN: I've got five more minutes, your Honor,
24 but I'm about to begin another section. If I may suggest that
25 it would be appropriate to break now?

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Joachimsthaller - Cross

1 THE COURT: All right. We'll give the jury their
2 midafternoon break.

3 We'll see you in 15 minutes.

4 (Continued on next page)

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Joachimsthaller - Cross

1 (Jury not present)

2 THE COURT: You may step down.

3 Please be seated. The witness can leave.

4 You can leave.

5 THE WITNESS: OK.

6 THE COURT: All right. So defense counsel had said he
7 would take an hour to an hour and a half. He hoped to complete
8 by the break, but he didn't guarantee that. He's taking an
9 hour and ten minutes. So when we come back, he will have
10 20 minutes, but not 21.

11 MR. LEWIN: Fair enough, your Honor.

12 THE COURT: Very good.

13 I'm sorry. There are issues regarding the next
14 witness that we'll take up now, so please be seated.

15 Someone remind me what those issues are.

16 MR. FLEMMING: Defense counsel filed a motion, a
17 Daubert motion, for the next expert, who is Dr. D'Arienzo.

18 THE COURT: Hold on. Let me get out my notes.

19 All right. So there were a variety of arguments made
20 in the motion in limine, but the only one that I think gives me
21 pause is that this witness, Mr. D'Arienzo, does not appear to
22 base his testimony, his opinions, on any methodology.

23 He is going to opine, first, that adidas' clothing and
24 Three-Stripe Mark are perceived as fashion statements rather
25 than just functional sportswear.

1 Second, that the line between luxury brands and
2 sportswear has blurred significantly.

3 And third, how adidas' various uses of the three-
4 stripe marks strengthen brand association among consumers.

5 So I'm not quite sure what methodology he used to
6 arrive at those conclusions. Maybe plaintiff's counsel can
7 elucidate that.

8 MR. FLEMMING: Starting with the last one, which is
9 the last part of his opinions which address what happens when a
10 brand like adidas uses a mark in the varied ways that the court
11 has been seeing, what that does for a brand that has been using
12 the mark like that for a long time and how it increases
13 engagement with consumers.

14 So he's relying on his 40 years of expertise in
15 branding and luxury branding and his analysis of the
16 marketplace and how adidas and other brands do the same --

17 THE COURT: No. I guess clearly this is not being
18 offered as, you know, scientific evidence or anything like
19 that. But on the other hand, it's not like he's relying on a
20 survey as the other experts have.

21 MR. FLEMMING: No, your Honor, he's not relying on a
22 survey.

23 THE COURT: He's just saying I've been around this
24 stuff a long time and here is my thoughts.

25 MR. FLEMMING: His working with many brands over the

1 years on these exact issues and how to increase touch points
2 with consumers and build equity in a brand and in a mark
3 through creative executions, yes.

4 MR. MALDONADO: Your Honor, if I may.

5 THE COURT: Let me hear from defense counsel.

6 MR. MALDONADO: None of that work he just described
7 from the other brands is disclosed in his report. He, for this
8 section of his report where he talks about various executions,
9 building consumer engagement, all he does is refer to various
10 brands that have used different variations of their brands over
11 years. But there is no data or any other reference that shows
12 how that has affected any of those brands. So he has no
13 empirical support or no other support cited in his report that
14 would support his conclusions.

15 THE COURT: So we may have to hear briefly from him
16 now outside the presence of the jury, but I guess the point I'm
17 making is this.

18 The Supreme Court has said that the requirements of
19 the Federal Rules of Evidence for experts apply to all experts,
20 obviously, and not just to scientific experts, and that means
21 that while Daubert is not, perhaps, applied with the same
22 demands as it would be in the case of scientific evidence,
23 still there has to be a consistent and reliable methodology.

24 So Rule 702 states, A witness who is qualified as an
25 expert by knowledge, skill, experience, training, or education,

1 may testify in the form of an opinion or otherwise if (a) the
2 expert's scientific, technical, or other specialized knowledge
3 will help the trier of fact to understand the evidence or to
4 determine a fact at issue.

5 And that used to be where it ended. Then after
6 Daubert it was amended, and now it is also required, The
7 testimony is based on sufficient facts or data, the testimony
8 is the product of reliable principles and methods, and the
9 expert has reliably applied the principles and methods to the
10 facts of the case.

11 So, for example, if there were two experts who had
12 devoted their life to studying baseball and one took the stand
13 and said, The greatest player in the history of baseball was
14 Babe Ruth and the other took the stand and said, No, the
15 greatest player in the history of baseball was Ted Williams,
16 and I will ask the apologies of the ghost of Ty Cobb for this
17 example, but if that was just their sort of opinion from
18 having, you know, immersed themselves, but they didn't have
19 anything more to say.

20 Now by contrast, if those experts could say, well, we
21 think you need to look at batting average and we think you need
22 to look at home runs, you need to look at slugging percentage,
23 etc., etc., etc., then there might be a basis for admitting
24 that.

25 But that doesn't sound like this expert here, so

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Joachimsthaler - Cross

1 that's your problem. But let me hear from plaintiff's counsel.

2 MR. FLEMMING: Your Honor, in this particular case it,
3 of course, does have the experience. But we don't think it is
4 necessary that he conduct a consumer survey of their specific
5 reactions to other brands who have played around with their
6 marks. He can measure, he can look and measure press coverage
7 of those iterations, he can look at --

8 THE COURT: Did he?

9 Did he measure press coverage?

10 MR. FLEMMING: He looked at it. I wouldn't say he
11 measured it.

12 THE COURT: That's a big difference, I think.

13 MR. FLEMMING: Yes, your Honor.

14 THE COURT: I'm sorry, I interrupted you.

15 What else?

16 MR. FLEMMING: I should say analyzed press coverage
17 and analyzed buzz generated by these executions, showing the
18 point that by playing around with a mark creatively increases
19 consumer engagement with that mark and increases their
20 engagement with that brand.

21 We don't believe that --

22 THE COURT: Let's bring the witness in, please.

23 MR. MALDONADO: What's that?

24 MR. FLEMMING: What did you say, your Honor?

25 THE COURT: I'm sorry, defense counsel wanted to say

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Joachimsthaler - Cross

1 something.

2 MR. MALDONADO: I wanted to say our reading of the
3 section of the report, I don't see any explanation of that in
4 there.

5 THE COURT: I'm sorry?

6 MR. MALDONADO: I don't see an explanation of what --

7 THE COURT: If someone would pass me up his report.

8 MR. MALDONADO: OK.

9 THE COURT: In hard copy, please. I know that's
10 putting you to the test, but...

11 Please take the stand.

12 Just state your name. You can be seated. State your
13 name for the record. We'll swear you in later.

14 MR. D'ARIENZO: William D'Arienzo.

15 THE COURT: Please be seated.

16 So, Mr. D'Arienzo, in forming your opinions in this
17 case, what methods or principles did you use to arrive at those
18 opinions?

19 MR. D'ARIENZO: Well, a variety --

20 THE COURT: Speak into the microphone so the lawyers
21 can hear you as well.

22 MR. D'ARIENZO: I'm sorry.

23 A variety of primary and secondary research, as well
24 as my own experience in the industry.

25 THE COURT: So, for example --

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Joachimsthaler - Cross

1 MR. MALDONADO: Your Honor, if it helps, start with
2 paragraph --

3 THE COURT: I'm sorry.

4 MR. MALDONADO: If it helps, our issue starts with
5 paragraph 68.

6 THE COURT: Thank you very much.

7 So you say in paragraph 68 of your report, "adidas
8 owns trademark registrations covering certain executions of the
9 Three-Stripe Mark, but adidas also uses its Three-Stripe Mark
10 in many other executions. From a fashion industry perspective,
11 these additional executions do not create different branding
12 devices, nor do they serve to lessen the recognizability and
13 source identifying function of the Three-Stripe Mark. To the
14 contrary, they enhance it."

15 Now, this wasn't based on any, for example, consumer
16 survey that did you, was it?

17 MR. D'ARIENZO: No, but it was based on consumer
18 response from a secondary sources online, such as List, which
19 evaluates consumers in terms of exchanges of information
20 online.

21 THE COURT: Is that referenced in your report?

22 THE WITNESS: It's not a direct reference to the List
23 platform. But to social media measurements, yes.

24 THE COURT: So then you say in 69, "Fashion brands
25 with high consumer recognition and deep emotional consumer

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Joachimsthaler - Cross

1 attachment to the brand and its marks and varied
2 configurations, the location, and design elements of their most
3 highly recognizable brand assets, without compromising the
4 clarity of the message and the integrity of the brand, doing so
5 keeps the relationship with consumers from becoming stale and
6 increases the fashion brand's coolness factor."

7 Just for my curiosity, are you an expert in coolness?

8 MR. D'ARIENZO: Occasionally.

9 THE COURT: I see. But more seriously, what was the
10 methodology that you relied on to arrive at what I've just
11 read?

12 MR. D'ARIENZO: Well, we looked at brands that are in
13 the same fashion space and how they have gone back and created
14 new iterations, new creations of the essential brand identity
15 by slight variations, sometimes even parodies of their own
16 logos.

17 Again, the fashionistas on the web, consumer groups on
18 the web highlight this as a kind of confidence, strength, if
19 you will, and kind of wink at the community that supports the
20 brand.

21 THE COURT: In your answer just then you said you
22 refer to the reaction of fashionistas and consumers.

23 THE WITNESS: Yes.

24 THE COURT: Those are two different groups, are they
25 not?

1 THE WITNESS: They could be. They could be
2 complimentary groups. They are overlapping groups.

3 THE COURT: I guess I'll ask counsel.

4 What's the relevance, if any, of a fashionista's
5 reaction to any issue in this case?

6 Not that, of course, we aren't all thrilled to hear
7 about fashionistas.

8 MR. FLEMMING: Your Honor, only to the extent that
9 they publish things that are then consumed by consumers who are
10 relevant people in this case.

11 THE COURT: To the extent that they publish things
12 that are?

13 MR. FLEMMING: That are read by consumers, in the
14 press.

15 THE COURT: Let's go to that. I'm not unfortunately
16 able to give you an example of a fashionista. The last one
17 that I had any knowledge of was Jackie Kennedy, but perhaps
18 there have been a few since then.

19 MR. D'ARIENZO: One or two.

20 THE COURT: So give me an example of a fashionista.

21 MR. D'ARIENZO: Let's talk about Rihanna, for example.

22 THE COURT: About who?

23 MR. D'ARIENZO: Rihanna.

24 THE COURT: Who is that?

25 MR. D'ARIENZO: With all due respect.

1 With all due respect, your Honor, she's a fairly
2 well-known entertainer from the Caribbean Islands who has
3 become an absolute icon in the fashion world with her own
4 collection of cosmetics and fashion from that effort.

5 THE COURT: So Rihanna says, I saw that change in the
6 adidas advertisement and it gave me a great big chuckle, that
7 was so clever, as I understand is one of your situations you're
8 describing.

9 MR. D'ARIENZO: Then she goes and gets the T-shirt.

10 THE COURT: And then she goes and gets the T-shirt.
11 Let's distinguish those two for a minute.

12 MR. D'ARIENZO: OK.

13 THE COURT: So when she says the first -- and let's
14 say she says it online or in a television show or whatever,
15 wherever fashionistas --

16 MR. D'ARIENZO: Congregate nowadays.

17 THE COURT: Right.

18 What is the basis for your assertion that some
19 consumer says, Ah, if Rihanna thinks that is clever, I should
20 think it is clever, too?

21 MR. D'ARIENZO: Well, the sense of leadership,
22 fashionista, that is the community that follows the brands and
23 follows her.

24 THE COURT: I mean, isn't that just sort of, you know,
25 we had some testimony here about some very famous sports

1 figures, Lebron James for example, who adidas advertised.

2 Now, the jury, through their ordinary experience, can
3 assess how someone might react to Lebron James wearing an
4 adidas shirt. And what if you tell me is so, everyone who is
5 at least ten years younger than me then would be able to assess
6 how an everyday consumer would react to Rihanna wearing an
7 adidas shirt.

8 So I'm not sure what it is that you're adding to that
9 everyday assessment.

10 MR. D'ARIENZO: The fact that she is a trendsetter,
11 and if she's wearing it, it confirms the fact that no equity
12 has been lost in the conversion of the brand's details and the
13 logo.

14 THE COURT: I see. All right.

15 I have to discuss some matters with counsel. We'll
16 call you back in a very few minutes.

17 MR. D'ARIENZO: Thank you. Shall I?

18 THE COURT: You can step down.

19 MR. D'ARIENZO: Thank you.

20 THE COURT: Yes. My law clerk points out that my
21 ignorance was well on display. It's Rihanna, as I pronounced
22 it, and I have no doubt that I am one of maybe only four people
23 in the world who have never heard of her.

24 But the question is, most of what he's testifying
25 about, at least as to the extent we just discussed it, you

1 don't need expert testimony. Everyday consumers can assess
2 what a normal reaction would be to someone wearing an adidas
3 shirt, or if they were a major sports figure or something like
4 that. He says what he's adding is that it doesn't diminish the
5 strength of the mark.

6 Let me make sure I understand. Is defense counsel
7 claiming that it diminishes the strength of the mark?

8 MR. MALDONADO: That's their theory.

9 THE COURT: I'm sorry?

10 MR. MALDONADO: That's their theory, that Thom
11 Browne's use of the stripes diminishes the mark. That's the
12 plaintiff's theory.

13 THE COURT: No, no, no. Maybe I'm not hearing you.
14 You want to get closer to a mic.

15 MR. MALDONADO: Sure.

16 THE COURT: So clearly we've had testimony that all
17 these famous people wear adidas, and I'm sure they are doing
18 that sheer out of love and not because they are being paid. In
19 any event, they wear adidas, and plaintiffs have introduced
20 that evidence presumably to show how strong the mark is.

21 Is it your contention that, actually, no, that
22 diminishes the strength of the mark?

23 MR. MALDONADO: Celebrities wearing the brand?

24 THE COURT: Yes.

25 MR. MALDONADO: No, that's not our contention.

1 THE COURT: What's the relevance of the expert?

2 MR. FLEMMING: Your Honor, this goes to whether the
3 more maybe outrageous executions of a Three-Stripe Mark dilute
4 consumer's recognition of it. Whether it just blurs things
5 together and they don't really know what is happening, which I
6 believe is an argument that defense counsel --

7 THE COURT: I don't think this guy has the expertise
8 to testify about that. His expertise is not on consumers. His
9 expertise is on fashionistas, and he has quite correctly
10 exposed my ignorance of that entire field.

11 But I still, and I think the jury still understands
12 the everyday experience of seeing a television or media
13 commercial where some famous person wears a particular item.
14 And then the question is, does that strengthen it, does it
15 weaken it?

16 But he's not really talking to that, other than very
17 indirectly, and he's not basing it on any surveys or anything
18 like that. I'm tempted to exclude it.

19 MR. FLEMMING: Your Honor, he did not conduct a survey
20 in this case. But as part of his work, he has conducted many
21 consumer surveys in the branding area.

22 THE COURT: Well, that may be, but that's not in his
23 report, as I understand it.

24 MR. FLEMMING: He references all of his history of
25 conducting surveys. That is absolutely in his report.

1 THE COURT: Does he reference it with reflect to any
2 given opinion?

3 The point is, does he say, for example, the two
4 paragraphs we just read, does he say in any part of his report,
5 I arrived at this opinion because of a survey I conducted
6 20 years before or because of a survey by Mr. Jones that I had
7 read or anything like that?

8 I don't think so.

9 MR. FLEMMING: No, your Honor.

10 If I may, I think the one issue -- it doesn't seem
11 that defense counsel is making a big of a deal now, as maybe
12 previously, about more outrageous executions of the Three-
13 Stripe Mark.

14 But the one thing that we wanted the jury to hear was
15 his testimony about how different executions can still being
16 recognized from a branding device.

17 THE COURT: Let's find out what defense counsel --

18 Give me an example of what you had in mind, and then
19 we'll hear from defense counsel.

20 An example of what we had in mind, I guess back when
21 this report was originally written was, deposition testimony,
22 is this a Three-Stripe Mark, is this a Three-Stripe Mark, is
23 this a Three-Stripe Mark, choosing some very specialized
24 products where adidas got very playful with the three stripes
25 and not known as a classic execution.

N16sADI6

Joachimsthaler - Cross

1 I don't believe that defense counsel is making a big
2 of a deal about that anymore. What Dr. D'Arienzo does talk
3 about --

4 THE COURT: Let's find out the answer.

5 Is that still in this case?

6 MR. MALDONADO: I don't believe so, your Honor.

7 THE COURT: OK. So that's fine.

8 With that, on that representation, which will be of
9 course enforced, I think we can excuse this witness.

10 All right. We're going to take no more than a
11 five-minute break.

12 (Recess)

N16sADI6

Joachimsthaler - Cross

1 (Jury present)

2 THE COURT: We need the witness. Sorry.

3 Ladies and gentlemen, just so you know, we are sorry
4 for that long break, but it actually was very helpful. It
5 helped shorten the testimony. It really was to your benefit,
6 you just didn't know it.

7 All right, counsel.

8 BY MR. LEWIN:

9 Q. I just want to get the last questions. I'm on a very tight
10 time limit.

11 You would agree with me, would you not, that --

12 Well, withdrawn.

13 You are aware, are you not, of a collaboration between
14 adidas and Gucci?

15 A. Yes.

16 Q. And are you aware that that collaboration has resulted in
17 merchandise bearing both the name Gucci and the name adidas on
18 the same product?

19 A. Yes, I think so.

20 Q. All right. And if I may show you DTX 330.

21 MR. LEWIN: I believe, your Honor, I believe this is
22 admitted.

23 THE COURT: Yes.

24 MR. LEWIN: We can publish, please.

25 Can we zoom in on the right side, please, so we can

N16sADI6

Joachimsthaler - Cross

1 see that what appears to be a Trefoil.

2 BY MR. LEWIN:

3 Q. You see the Trefoil on the right side?

4 A. Yes.

5 Q. You see the name underneath it?

6 A. Yes.

7 Q. What does that name say?

8 A. Gucci.

9 Q. Earlier you testified that Trefoil was, I believe,

10 reasonably well known to adidas, correct?

11 A. Yes.

12 Q. Would you consider the use by Gucci of this adidas Trefoil

13 to be enhancing the relationship between adidas and its

14 Trefoil?

15 A. I don't know whether be it enhances the relationship. I

16 don't know that.

17 Q. Well, if you were advising adidas, would you tell them to

18 do something like this?

19 MR. FLEMMING: Objection, speculation.

20 THE COURT: Sustained.

21 Q. In your opinion, sir, does not -- withdrawn.

22 Would you agree with me, sir, that the Gucci Trefoil
23 combination here diminishes adidas' brand association?

24 A. Again, I don't know that. That would be a speculation,
25 again.

N16sADI6

Joachimsthaler - Cross

1 Q. Well, you've testified that their Trefoil is associated
2 with adidas and you've testified that the Trefoil carries the
3 three stripes in it, correct?

4 A. Yes.

5 Q. And one of the things that the Trefoil more often than not
6 is it carries the name adidas with it?

7 A. Correct.

8 Q. Now it carries the name Gucci --

9 A. Yes.

10 Q. -- correct?

11 Do you have a view or opinion of whether that weakens
12 the association between adidas and Gucci?

13 A. Yes. As you know from my report and my analysis and my
14 testimony in deposition, there are sometimes when one brand is
15 extremely strong, like Gucci, and there is another brand that's
16 extremely strong, like the adidas. Sometimes there are ways
17 that these -- there is some collaboration.

18 There is some research usually done, as is also said
19 in my deposition, and then the company makes a decision whether
20 they do it or not. But the key here is that this is a decision
21 that Gucci and adidas have agreed on. They are in control of
22 the brand. It's entirely different in the discussion we had up
23 to now.

24 Q. But in your view, sir, weren't you of the opinion that this
25 does not enhance the association between adidas and the

N16sADI6

Joachimsthaler - Cross

1 Trefoil?

2 A. In my opinion, I'm not in favor of this kind of
3 collaborations. It is a trend right now in the industry to do
4 so.

5 Q. Sir, thank you.

6 A. But it's not my --

7 Q. Thank you.

8 A. Yes.

9 Q. You indicated in earlier testimony, I think in your
10 demonstrative in the case, the word luxury, a concept of luxury
11 is associated with Thom Browne, correct.

12 And that same demonstrative indicated that the word
13 luxury is not associated with or -- I'm sorry -- the attribute
14 luxury was not associated with adidas, correct?

15 A. Yes.

16 Q. And you indicated earlier that Nike, in your view, is seen
17 as an exclusive brand?

18 A. Yes.

19 Q. And adidas is seen as inclusive, correct?

20 A. Yes.

21 Q. And your view is that an association between an exclusive
22 brand and an inclusive brand diminishes the inclusive brand, is
23 that correct?

24 A. Yes.

25 Q. All right. Do you regard Gucci as an inclusive brand?

N16sADI6

Joachimsthaler - Cross

1 A. I don't --

2 Q. Withdrawn.

3 A. Yes.

4 Q. Before you start to answer, I apologize for that.

5 Do you regard Gucci as inclusive or exclusive?

6 MR. FLEMMING: Objection to foundation.

7 THE COURT: Sustained, but you may be able to lay a
8 foundation.

9 Q. Well, are you aware of the brand Gucci, sir?

10 A. I know it as I know many other brands, but I haven't
11 researched it in particular.

12 Q. I didn't ask that.

13 Are you aware of the products that are sold around the
14 world under the Gucci name?

15 A. Um, I know vaguely the product, yeah.

16 Q. Would you consider Gucci to be a luxury brand?

17 A. Yes.

18 MR. FLEMMING: Objection, foundation.

19 THE COURT: Overruled.

20 Q. You would consider Gucci, based on everything you know,
21 right?

22 A. Yes.

23 Q. All right.

24 THE COURT: The answer was yes?

25 THE WITNESS: Yes.

N16sADI6

Joachimsthaler - Cross

1 Q. Thank you.

2 And luxury brands are exclusive, are they not?

3 A. Luxury brands are exclusive, but not all exclusive brands
4 are luxury.

5 Q. Fair enough.

6 But Gucci is a luxury brand that sells at very high
7 prices, correct?

8 A. Yeah.

9 Q. And limited distribution, correct?

10 A. Yes.

11 Q. Certainly higher prices than comparable products if there
12 were -- withdrawn.

13 A. True. But it can be --

14 THE COURT: No, I think he withdrew that.

15 MR. LEWIN: Yes.

16 Q. So the luxury definition that we're applying to Gucci is
17 similar to the luxury definition that we're applying to Thom
18 Browne, correct?

19 A. No.

20 Q. No.

21 Gucci has a three-color stripe it uses. Are you aware
22 of that?

23 A. No.

24 Q. OK.

25 A. Oh, the color. Yeah, the color bands.

N16sADI6

Joachimsthaler - Cross

1 Q. The color band?

2 A. Yes.

3 Q. And they use that as a visual brand identifier, correct?

4 A. Yes.

5 Q. And what would your opinion be, sir, as to the garment that
6 carried both adidas stripes and Gucci stripes?

7 A. I already --

8 MR. FLEMMING: Objection. Objection, foundation and
9 vague.

10 THE COURT: Sustained.

11 Q. Have you ever seen Gucci products?

12 A. Yes.

13 Q. Have you ever seen Gucci products with the adidas Trefoil
14 on them?

15 A. Um, I don't know what their product was that you showed me
16 just now.

17 Q. OK. But let me show you DTX 330, fifth page, please.

18 All right. I'm showing you a photograph blown up of a
19 product which carries green red green stripes, correct?

20 A. Yes.

21 Q. And do you recognize those to be Gucci?

22 A. Yes.

23 Q. And it also carries the word Gucci --

24 A. Yes.

25 Q. -- correct?

N16sADI6

Joachimsthaler - Cross

1 And it carries a Trefoil with three stripes running
2 across it, correct?

3 A. Yes.

4 Q. In your view, does that association enhance the brand value
5 of adidas?

6 A. You already asked me the question and I answered it
7 already.

8 Q. Well, do me a favor and answer me again.

9 Does this enhance the brand value of adidas?

10 A. Again, I don't know. I have -- there are conditions, as I
11 already testified and I wrote in my deposition. You asked me
12 already in deposition.

13 THE COURT: No. First of all, it's irrelevant what
14 was asked in the deposition because the jury does not have the
15 deposition.

16 THE WITNESS: OK.

17 So there are situations where two brands are very
18 strong. One, for an example, is Gucci, very global brand, and
19 there is another brand called adidas. And they choose to do
20 some collaborations.

21 It's not my favorite. It's a trend in the industry
22 right now --

23 BY MR. LEWIN:

24 Q. Excuse me.

25 A. -- and I don't know -- I don't know yet whether this will

N16sADI6

Joachimsthaler - Cross

1 be positive or negative. There is no evidence right now.

2 Q. So you have no opinion then on this, correct?

3 A. I usually base my opinion --

4 Q. Sir, I asked you a question whether you have an opinion or
5 not. It's a simple yes or no.

6 A. I don't have an opinion.

7 Q. Thank you, sir.

8 I ask forgiveness in advance because I'm going to deal
9 with your brain node discussion.

10 If I understand this correctly, if a consumer looks at
11 Thom Browne with four stripes on a pair of trousers, for
12 example, and the attributes of that are very clear in that
13 consumer's mind, correct. However, however because of kind of
14 an association with adidas in his mind with stripes, he
15 associates the attributes of Thom Browne to adidas, is that
16 correct?

17 A. Yes.

18 Q. OK. And your testimony is that harm to the adidas brand
19 occurs because the pathway from the brain to adidas gets, in my
20 words, cluttered?

21 A. No. No, that's not it.

22 Q. OK. Can you explain to me then how that harm occurs?

23 A. OK. Um, the survey research, the empirical research and
24 survey research, not only in this particular case but also in
25 our field for many years, now shows that -- shows that

N16sADI6

Joachimsthaler - Cross

1 consumers see a visual identifier -- let's say it's four
2 stripes from Thom Browne, as you suggest. Sometimes they only
3 see the fraction. Sometimes they see only for split seconds.
4 Sometimes they actually sit in front of it, like I do right
5 now, in one case. And then -- then what happens is the
6 consumer, this theory is consumers process in certain
7 psychological principles, cognitive, how memory works. One is
8 called Gestalt. That means that they see a fraction and they
9 complete something, oftentimes as we heard earlier, that
10 doesn't even exist. They just think they see something that
11 they see familiar.

12 If that consumer goes into his memory, that's the
13 process. In his memory, he's making a search for a pattern.
14 If that consumer knows adidas and is familiar with adidas,
15 which is very likely because a large percentage of consumers do
16 know adidas --

17 Q. Sir.

18 A. -- then what happens is, there is a matching of that, and
19 that's the first fundamental way how the brain is then --
20 activation is spreading. The second principle takes place, and
21 that means that the association, that part of Thom Browne
22 become gradually smooshed up we said, I think --

23 Q. I got it.

24 A. -- with those of adidas.

25 Q. Thank you.

N16sADI6

Joachimsthaler - Cross

1 You mentioned Gestalt's theory, correct?

2 A. Yes.

3 Q. And isn't it true that the dominant theory, this dominant
4 theory which, as you say and as his honor said in a very strong
5 theory, for many years in terms of the area of branding and
6 thinking in that cognitive fashion.

7 Isn't it true under cognitive theory that it's not any
8 individual design element of any product, but rather all of
9 those elements in a product working together that produces an
10 effect on the viewer?

11 A. That's not correct. That's exactly --

12 Q. All right. Thank you, sir.

13 Can we turn to tab C in the report on paragraph 218
14 and publish it please to everyone but the jury.

15 Now, do you recall this paragraph, sir?

16 A. Yes.

17 Q. All right. And would you agree with me that it says that
18 you wrote in your report, right, it's not any individual design
19 element of any product, but rather the elements working
20 together that produces an effect on the viewer?

21 A. Yes.

22 Q. OK. Thank you.

23 So when a consumer -- to make this a little simpler,
24 it's the overall impact of all of those different elements that
25 produces the effect on the viewer, correct?

N16sADI6

Joachimsthaler - Cross

1 A. It's not -- there are several principles within the Gestalt
2 theory, and part is true what you say and part is not true.
3 Consumers choose particular elements, not all of the elements.
4 They take some of the elements, but then they form -- which is
5 called closure. Closure is one of the four, five principles
6 that fall underneath Gestalt theory. And closure means that,
7 even if I show you something like this, consumers actually see
8 a ring. Assume this is a ring, even though I showed you a C.
9 But consumers make the closure.

10 There are five, six principles that you apply.
11 How they process information, not only how they perceive
12 information and process through the retina, and then goes into
13 memory. And second, how they process that in memory given the
14 other principles we mentioned.

15 Q. Sir, would you not agree with me that a person looking at a
16 Thom Browne product -- let's say a suit that has four bars on
17 the left -- processes that image using not only the four bars,
18 but the fit, the finish, what he may know about price, quality,
19 and otherwise as he looks at that image?

20 A. No.

21 Q. That's all I'm asking you.

22 A. No.

23 Q. All right.

24 A. That's not how it works.

25 Q. OK.

N16sADI6

Joachimsthaler - Cross

1 A. As the principles already are defined.

2 Q. Is it your testimony, sir, that when somebody looks at a
3 Thom Browne product, he is not impacted by the tailoring of the
4 product?

5 A. That's what I not said.

6 Q. All right. Do I understand you, and would you agree, that
7 it has nothing to do with the Grosgrain signature?

8 A. With?

9 Q. The Grosgrain signature?

10 A. I don't know what the question is.

11 Q. I'll withdraw it.

12 A. OK.

13 Q. It's possible, is it not, that a person looking at an
14 old-fashioned adidas track suit, for example, would not only
15 process the stripes, but the fact that it was made of nylon?

16 MR. FLEMMING: Objection, speculation.

17 THE COURT: No, I'll allow it.

18 A. And the question, what was the material you said?

19 MR. LEWIN: Can you read back the question, please?

20 The material was nylon.

21 THE WITNESS: Nylon?

22 MR. LEWIN: Yes.

23 (Record read)

24 A. If the consumer knows and can see the nylon, yes.

25 Q. Yes. Same way that we used to hear them go swish, swish on

N16sADI6

Joachimsthaler - Cross

1 airplanes, correct?

2 A. Yes.

3 Q. Would you agree with me, sir, that the Thom Browne four
4 bands on the left sleeve are quite different visually than the
5 three vertical bars you tested in your empirical study?

6 A. The Thom Browne?

7 Q. Four bars.

8 A. Four bars.

9 Q. Quite different visually than the three bars running down
10 the sleeve that you tested in the adidas matter?

11 MR. FLEMMING: Objection, outside the scope and
12 speculation.

13 THE COURT: Overruled.

14 A. The four stars from Thom Browne are what I tested on in my
15 survey?

16 Q. Yes.

17 A. From a design perspective, if I have the length of time a
18 designer would find differences between that. But that's not
19 how consumers process information. Consumers --

20 (Continued on next page)

N16Qadi7

Joachimsthaler - Cross

1 BY MR. LEWIN: (Continued)

2 Q. I didn't ask you that, sir. Forgive me for interrupting
3 you, but, again, I have limited time, so...

4 You agree the adidas stripes that you tested are
5 vertical, correct?

6 A. The one --

7 Q. That you tested.

8 A. Yes, I did. Yes.

9 Q. And the reason that you tested that because that's the one
10 that's associated with adidas. Isn't that your testimony, sir?

11 A. Yes.

12 THE COURT: Counsel, you have two minutes.

13 MR. LEWIN: I know. I'm watching it carefully.

14 Q. Are you aware of any data that indicates that by reason of
15 adidas -- by reason of Thom Browne's use of four bars that
16 somehow adidas has lost market share to Thom Browne?

17 A. It would be impossible to even think of having data like
18 that.

19 Q. So the answer would be no?

20 A. There can't be data. It is such an abstract concept. It's
21 almost unrelated to the question of harm here.

22 Q. Are you aware of any impact on brand loyalty by reason of
23 the use of Thom Browne's use of four bars on adidas?

24 A. How possibly could I know that the consumer has made a
25 choice of buying a Thom Browne over buying an adidas? It's

N16Qadi7

Joachimsthaler - Redirect

1 just impossible.

2 Q. Thank you, sir. Thank you.

3 A. It's impossible.

4 Q. Thank you.

5 MR. LEWIN: No further questions. I'll pass the
6 witness.

7 THE COURT: Redirect.

8 MR. FLEMMING: Thank you, your Honor.

9 REDIRECT EXAMINATION

10 BY MR. FLEMMING:

11 Dr. J, are you here to give an opinion -- an expert
12 opinion on the likelihood of confusion between the parties'
13 products?

14 A. No.

15 Q. Let's bring up exhibit -- Plaintiff's Exhibit 285, please.
16 Let's start on page 2.

17 Dr. J, do you recognize what we're looking at?

18 A. Yes.

19 Q. What is it?

20 A. That's the survey I conducted.

21 Q. The title of the survey at the top, would respondents see
22 that?

23 A. Yes.

24 Q. And then if you go down -- let's scroll down a little bit.
25 Go to page 3. Let's go to question 6. Do you see that

N16Qadi7

Joachimsthaller - Redirect

1 question in which industry do you or members of your household
2 work?

3 A. Yes.

4 Q. Do you see the ninth option?

5 A. Yes.

6 Q. It's sports and active wear?

7 A. Yes.

8 Q. Why did you choose those words here?

9 A. This was one of the things I did in order to make sure that
10 I really interviewed consumers and not people that are actually
11 working in that industry, you know, like somebody that might
12 work with sports and active wear.

13 Q. Let's go to page 4. Let's zoom in on the prompt. Do you
14 see in the first sentence, it says, "In the following section,
15 we would love to understand which brand of sports/active wear
16 you know"?

17 A. Yes.

18 Q. Why did you choose the phrase "sports/active wear"?

19 A. Because I -- that's the category that's what I wanted to
20 study.

21 Q. Let's look at the first red text there that's on the
22 screen. It says, "new screen for each long sleeve shirt,
23 rotate."

24 Would respondents have seen that text?

25 A. They don't see that, but it's automated.

N16Qadi7

Joachimsthaler - Redirect

1 Q. Who is that text directed to?

2 A. This is to instructions to the computer, basically. It's a
3 computer instruction.

4 Q. So what happened as a result of this instruction?

5 A. Consumers -- the respondents in the survey, they see one
6 screen at a time. So they see adidas with three stripes, then
7 it goes away. As it says, it rotates, then they see something
8 else. And in order to make sure that adidas doesn't come
9 always the first time, I then sometimes showed Under Armour
10 first, and then I showed Nike sometimes first. I want to make
11 sure it's not always the first, just to be as objective as
12 possible.

13 Q. Let's zoom all the way out. Would consumers have seen --
14 sorry -- would respondents to your survey have seen these
15 products as we see here, all on one page?

16 A. No, you see them one at a time, and you respond to that
17 question.

18 Q. You can take that down. Thank you, Nita.

19 On cross you talked about the adidas collaboration
20 with Gucci, right?

21 A. Yes.

22 Q. And you talked about how adidas has some control over the
23 products in those collaborations?

24 A. Yeah.

25 Q. What did you mean by control?

N16Qadi7

Joachimsthaller - Redirect

1 A. Companies brands do from time to time certain
2 collaborations. They choose to do that for many reasons.
3 Control is so important because in the case with Gucci, adidas
4 and Gucci decide we do this together for a period of time, and
5 that's the control you want when you do things with your brand.
6 In the case we discuss here --

7 Q. I was going to get to that, but I actually sort of summed
8 it up right before. Does adidas have control of its brand in
9 connection with the Gucci collaboration?

10 A. That is really the --

11 MR. LEWIN: Objection.

12 THE COURT: Hold it.

13 MR. CONLEY: Sustained.

14 Q. Based on your research, how much control does adidas have
15 over what Thom Browne does with its own products?

16 A. No control.

17 Q. How does that result in harm to adidas?

18 A. Potential area of huge harm.

19 Q. Explain what you mean by that.

20 A. Because we know from the --

21 MR. LEWIN: Objection, your Honor. It's not in his
22 report.

23 MR. HENN: Yes, it is.

24 THE COURT: I'm not understanding the relevance. No
25 one contends that adidas has control over Thom Browne, and

N16Qadi7

Joachimsthaller - Redirect

1 therefore if Thom Browne has infringed or diluted adidas's
2 mark, they may have liability. That's what the jury is
3 focusing on. But no one suggests, that I can recall, that
4 there was an issue of whether or not Thom Browne had any
5 obligation to agree to any control by adidas.

6 Sustained.

7 MR. FLEMMING: May we briefly approach, your Honor?

8 THE COURT: All right.

9 MR. FLEMMING: Thank you.

10 (Continued on next page)

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1 (At the sidebar)

2 THE COURT: Just so we're all on the same page, the
3 redirect will be finished by 4:29, and recross, if any, will be
4 finished by 4:30.

5 Go ahead.

6 MR. FLEMMING: Last question, your Honor. The
7 trademark infringement the case law in trademark infringement,
8 it's very clear the loss of control over your own brand that
9 happens in trademark infringement is a serious form of harm,
10 and we all here may know that but the jury needs to hear that.

11 THE COURT: So if someone took the adidas brand and
12 did X, Y and Z without adidas's permission, that would be a
13 loss of control. But the issue here is whether what they did
14 with their own brand was such that it led to confusion with
15 adidas's brand. That is, I think, a totally different
16 question.

17 MR. FLEMMING: If consumers are confusing or
18 associating the two, then what Thom Browne does, which adidas
19 has no control over, has an impact on adidas's brand. That's
20 just the connection that's being made.

21 THE COURT: I see. That's not how I understood the
22 question. But I will allow that reformulation of that if you
23 can get this witness to answer in less than 20 minutes.

24 MR. FLEMMING: I will. Thank you.

25 (Continued on next page)

1 (In open court)

2 BY MR. FLEMMING:

3 Q. Dr. Joachimsthaler, very briefly, since we're at the end of
4 the day, how does adidas having no control over how Thom Browne
5 uses its four-stripped design and Grosgrain design, how does
6 that harm adidas?

7 A. At any time, there's something that can happen with Thom
8 Browne with a brand or they might do a campaign or launch a
9 product that fails, we know that Thom Browne four stripes links
10 up with three stripes in most of memory network and therefore
11 instantly harms adidas.

12 MR. FLEMMING: Pass the witness, your Honor.

13 THE COURT: Anything else? Any recross?

14 MR. LEWIN: Briefly. I think I have only two
15 questions.

16 RECROSS EXAMINATION

17 BY MR. LEWIN:

18 Q. One, you indicated to us originally in testimony that all
19 four images on your survey were shown to a consumer at the same
20 time. That wasn't correct, was it?

21 A. No, that was not correct. It would be impossible to --

22 THE COURT: The answer is, it wasn't correct.

23 Q. I think your report on your methodology indicated that it
24 was a rotating sequence, correct?

25 A. Yes.

N16Qadi7

Joachimsthaller - Recross

1 Q. And if I understand that right, 75 percent of the time
2 people would see a brand other than adidas first. Is that
3 correct?

4 A. Mathematically, if you have four choices, maybe that works
5 out mathematically 75 percent.

6 Q. And --

7 THE COURT: You've asked two questions, which is what
8 you said you would ask. I don't know, I assume you have five
9 fingers.

10 MR. LEWIN: Well, your Honor, I'm trying to think
11 whether or not I boxed myself in on that one.

12 THE COURT: You didn't box yourself in. You created a
13 representation to the Court that the Court is willing to
14 enforce.

15 MR. LEWIN: Fair enough, your Honor. I'm done.

16 THE COURT: That concludes the recross. Thank you
17 very much. You may step down.

18 THE WITNESS: Thank you.

19 (Witness excused)

20 THE COURT: Ladies and gentlemen, you will be glad to
21 know that despite all of this back-and-forth, we are on
22 schedule. I am told that the plaintiffs have just one more
23 witness, which we will hear first thing Monday, and then we
24 will go to the defense case, and we're very much in mind also
25 of the special situation for Juror No. 4 a/k/a 5, so we are

1 fine.

2 During the weekend, I don't want you to think at all
3 about this case. If you see three stripes anywhere, just say
4 three strikes and you're out.

5 So, in all seriousness, remember not to discuss this
6 case with anyone, have a very good weekend, and we'll see you
7 at 9:30 on Monday.

8 (Jury not present)

9 THE COURT: So my law clerk tells me that not only did
10 I get the original name wrong, but I even got the pronunciation
11 wrong, but if you want to know anything about Jenny Lynn, just
12 ask me.

13 Anyway, I do want to say in all seriousness, once
14 again, I am very grateful to counsel. There have been moments
15 when we've had ups and downs, but all of counsels' cases are
16 really doing a very excellent and professional job. The Court
17 is very appreciate of that. We will see you at -- I don't
18 think we have anything we need to discuss. The issue we
19 discussed this morning will come up again at charging
20 conference but not before that. I'm sorry, Yes, sir.

21 MR. CONLEY: There is, your Honor, some objections to
22 Mr. Plumpe's slides, the adidas expert who will testify Monday.

23 THE COURT: Why don't we get together at 9:15 on
24 Monday.

25 (Trial continued January 9, 2023 at 9:15 a.m.)

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PLAINTIFF EXHIBITS

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181 through 184, 1314, 191613

through 195, 197, 176, 693,

694, 705, 706, 707, 708 and

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285637

286644

DEFENDANT EXHIBITS

Exhibit No. Received

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922593